United Nations A/71/284

General Assembly

Distr.: General
4 August 2016

Original: English

Seventy-first session
Item 69 (b) of the provisional agenda*
Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms

Promotion and protection of human rights, including ways and means to promote the human rights of migrants

Report of the Secretary-General

Summary

The present report is submitted pursuant to General Assembly resolution 70/147 on the protection of migrants. In the resolution, the Assembly requested the Secretary-General to submit to the Assembly and the Human Rights Council at their seventy-first and thirty-third sessions, respectively, a comprehensive report entitled "Human rights of migrants", covering all aspects of the implementation of the resolution.

* A/71/150.

16-13508 (E) 190816

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I. Introduction

1. In resolution 70/147 on the protection of migrants, which was adopted by the General Assembly on 17 December 2015, the Assembly called upon States to promote and protect effectively the human rights and fundamental freedoms of all migrants, regardless of their migration status, especially those of women and children, and to address international migration through international, regional or bilateral cooperation and dialogue and a comprehensive and balanced approach, recognizing the roles and responsibilities of countries of origin, transit and destination in promoting and protecting the human rights of all migrants and avoiding approaches that might aggravate their vulnerability.

2. In paragraph 17 of the aforementioned resolution, the General Assembly requested the Secretary-General to submit to the Assembly and the Human Rights Council at their seventy-first and thirty-third sessions, respectively, a comprehensive report entitled "Human rights of migrants", covering all aspects of the implementation of the resolution.

3. The present report contains a summary of the written submissions received from Governments in response to a note verbale sent from the Office of the United Nations High Commissioner for Human Rights on behalf of the Secretary-General requesting information on the implementation of resolution 70/147.

4. In its resolution 32/14, entitled "Protection of the human rights of migrants: strengthening the promotion and protection of the human rights of migrants, including in large movements", which was adopted by the Human Rights Council on 1 July 2016, the Council requested the United Nations High Commissioner for Human Rights to submit to the Council before its thirty-third session a report on the promotion and protection of the human rights of migrants in the context of large movements, in consultation with States and other relevant stakeholders, including regional organizations, civil society organizations and national human rights institutions, and to transmit the report to the General Assembly at its seventy-first session.

II. Summary of information received from Governments with regard to the implementation of General Assembly resolution 70/147

5. As at 4 July 2016, replies concerning the implementation of General Assembly resolution 70/147 had been received from Mexico and Romania. Summaries of the responses are provided below. The full texts of the responses are available on the website on migration and human rights of the Office of the United Nations High Commissioner for Human Rights.[1]

Mexico

6. The Government indicated that the protection of the human rights of migrants, regardless of their immigration status, must be guaranteed throughout the migration

[1] The full texts of submissions are available from www.ohchr.org/EN/Issues/Migration/Pages/ReportGA71.aspx.

cycle (origin, transit, destination and return) and that particular attention should be provided to vulnerable groups, including unaccompanied children, older persons and persons with disabilities.

7. The Government provided an overview of the normative and policy frameworks governing migration-related issues, such as the 2011 Migration Law and the 2014-2018 Special Migration Programme. The Migration Law and its Regulation ensure the protection of the human rights of migrants, decriminalize irregular migration and guarantee access to, inter alia, justice, health care, education and birth registration, regardless of migration status.

8. Through the Special Migration Programme, the various authorities of the Federal Public Administration implement actions contained in the Migration Law that promote, protect and fulfil the human rights of migrants. Other administrative provisions on migration, such as the Guidelines on the Protection of Migrants, aim to protect and assist migrants in full respect for their human rights. The Guidelines provide for the creation of groups for the protection of migrants (Beta Groups), which aim to protect the rights of migrants, regardless of their nationality or migration status, including through search and rescue operations and the provision of legal advice and humanitarian assistance.

9. The Migration Law provides some alternatives to immigration detention, including the option for the person who has been detained by immigration authorities to be delivered into the custody of their diplomatic representatives or an institution that aims to protect the rights of migrants. Unaccompanied migrant children should be channelled to the National and Federal Systems for Integral Family Development for the provision of shelter and appropriate care. The protocol for the protection of unaccompanied migrant children in shelters establishes a mechanism for assessing the best interests of children and adolescents under the principle of informed participation.

10. The Government indicated various initiatives to protect the human rights of returning migrants and to facilitate their social and labour-related reintegration. Some of the programmes include the provision of, inter alia, information, counselling and medical care.

11. To combat discrimination and xenophobia against migrants, the Government has launched a number of campaigns focused on changing perceptions, eradicating stigma and providing information about rights and services.

12. With regard to the issue of smuggling, the Government highlighted various initiatives, including the development of guidelines for a comprehensive approach to the smuggling of migrants and campaigns to provide information on the risks involved in hiring the services of smugglers in efforts to cross international borders.

13. Mexico has also developed several initiatives to facilitate and reduce the cost of remittances.

Romania

14. The Government reported that the Romanian authorities have taken a series of measures to align national legislation with international and regional standards in the area of migration and asylum.

15. The Government provided information regarding the reception conditions of applicants for international protection, including in relation to the right to appeal and access to health care, an adequate standard of living and employment. The Government noted that a person should not be subject to detention for the sole reason of having sought international protection, and that any decision to detain a person should be taken on a case-by-case basis, following an individual assessment, and should be consistent with the principles of necessity and proportionality.

16. The Government provided an overview of the legal provisions to prevent and sanction all forms of discrimination, including Emergency Ordinance No. 194/2002 on the status of foreigners in Romania. The Ordinance provides equal access to employment, equitable working conditions, education, vocational training, social security, health care, housing and freedom of association.

17. The Government noted that Law 263/2010 on the public pension system provides that persons enrolled in the public pension system may receive social security benefits regardless their citizenship or place of stay.

18. In relation to labour inspection, the Government noted that Ordinance No. 25/2014 on the employment of migrant workers in Romania establishes that irregular migrants should be informed in writing, in Romanian and in English, by the General Inspectorate for Immigration or, where appropriate, by the labour inspectors from the labour inspectorates, about the rights they have in relation to recovering remuneration due to them by their employer before the execution of any removal decision. The employer is liable to pay any remaining remuneration, taxes and social security contributions that the employer would have paid if the migrant had been regularly employed and to pay any costs arising from sending the payments due to the country to which the migrants have been returned.

19. The Government reported on its national strategy in the fight against the trafficking in human beings. The protection of victims of trafficking is ensured by the National Agency against Trafficking in Persons. Furthermore, the National Mechanism for Identification and Referral establishes that migrant victims of trafficking shall be entitled without discrimination to the same support and protection measures as Romanian victims. They should be informed in a language they can understand about their right to a maximum of 90 days in which to recover and to access specialized support services, including accommodation in special centres, and about the provision of psychological, medical and social assistance. The Government reported that since 2015, new tools have been established to identify vulnerable persons, including victims of trafficking.

III. Conclusion

20. The submissions received highlight legal and policy frameworks on the protection and promotion of the human rights of migrants.

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Human rights of migrants

Note by the Secretary-General

The Secretary-General has the honour to transmit to the General Assembly the report of the Special Rapporteur on the human rights of migrants, Mr. François Crépeau, in accordance with General Assembly resolution 70/147.

* A/71/150.

16-13509 (E) 190816

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Report of the Special Rapporteur on the human rights of migrants

Summary

The present report outlines the main activities undertaken by the Special Rapporteur of the Human Rights Council on the human rights of migrants during the reporting period since his most recent report to the General Assembly.

The thematic section of the report outlines proposals for the development of the global compact on migration, with a view, in particular, to ensuring that human rights are effectively included and mainstreamed therein. The report underlines the importance of taking a long-term strategic approach to developing the global compact for accessible, regular, safe and affordable mobility policies and practices that will place States in a better position to respond to the significant demographic, economic, social, political and cultural challenges that lie ahead.

I. Introduction

1. The present report is submitted to the General Assembly by the Special Rapporteur of the Human Rights Council on the human rights of migrants, François Crépeau, pursuant to its resolution 70/147.

II. Activities

2. The Special Rapporteur was consulted by the Special Adviser of the Secretary-General on the summit on addressing large movements of refugees and migrants and provided oral and written input towards the development of her report addressing the issue of large movements of refugees and migrants.

3. The Special Rapporteur also participated and contributed to a number of international and regional dialogues and conferences, including the Department of Economic and Social Affairs coordination meeting on international migration and the consultation on the Migrants in Countries in Crisis Initiative organized by the International Organization for Migration (IOM).

4. Due to the continuing arrival of unprecedented numbers of irregular migrants at the external borders of the member States of the European Union, the Special Rapporteur has remained focused on the issue (see A/HRC/29/36). The Special Rapporteur provided suggestions for key European Union policy documents such as the European Migration Agenda and the European Parliament's Committee on Civil Liberties, Justice and Home Affairs report on the situation in the Mediterranean and the need for a holistic European Union approach to migration. He also briefed the Italian Interministerial Committee on Human Rights and provided a briefing to the European Parliament Subcommittee on Human Rights.

5. The Special Rapporteur's planned visit to Australia in October 2015 was postponed to November 2016. He has reiterated his request to visit Nauru and Papua New Guinea and looks forward to receiving a response and confirmation of the dates for a visit in November 2016.

6. The Special Rapporteur visited Angola and Greece in May 2016. His related reports will be submitted to the Human Rights Council at its thirty-fifth session.

7. The Special Rapporteur submitted his report on the impact of bilateral and multilateral trade agreements on the human rights of migrants to the Human Rights Council at its thirty-second session (A/HRC/32/40).

III. The global compact for safe, regular and orderly mobility

A. Background

8. There are approximately 244 million migrants worldwide today — an increase of 41 per cent (71 million) since 2000. Most migrants originate from middle-income countries, with 59 per cent settling in developed regions, where they make up some 11 per cent of the population. Between 2000 and 2015, Asia received 1.7 million

migrants per year, more than any other geographical region in the world,[1] and is on track to overtake Europe as the area hosting the largest number of migrants in the near future. Women make up 48 per cent of all international migrants. In Europe and North America, the majority of migrants are female, while in Africa and Western Asia, the majority of migrants are male. Approximately 15 per cent of all international migrants are younger than 19 years of age.

9. Ageing populations have caused a shift in demographics that has led to labour shortages. In 2010, for the first time, more workers were retiring from the European labour market than joining it. By 2030, if trends continue, the labour shortage in Europe is likely to rise to 8.3 million workers. At the same time, many member States of the European Union have fertility rates below the rate of replacement. Similarly, by 2020, large economies such as Canada, China, the Republic of Korea and the Russian Federation will also face labour shortages.

10. These demographic shifts will add pressure and impetus to the need to balance labour supply and demand. Currently, 72 per cent of migrants are of working age, a factor that could contribute to bridging the gap in "ageing economies". To meet employment targets, States could harness the capacity of these migrants by employing a complex migration policy mix and reconsidering how they utilize their skills (see A/70/59). Employers could embrace diversity and rely on recruitment from a global labour force, as migrants with all kinds of skills will be required for many sectors of the economy.

11. Many migrants move voluntarily in a safe and regular manner and live and work in conditions in which their labour and human rights are respected. In some circumstances, families are reunified. Others are forced to migrate as a result of push factors, including poverty, discrimination, violence, conflict, political upheaval and poor governance, and pull factors, including official or unacknowledged labour needs, as explained above, or for family reunification. Children are disproportionately represented among those forcibly displaced. In the context of natural disasters and climate change, migration is increasingly seen as an adaptation measure ensuring resilience through planned mobility. In the process of migration, many face exploitation, discrimination, abuse and other human rights violations.

12. Putting up a barrier between push and pull factors to prevent mobility without responding to the need to leave and the need for workers creates conditions for the creation of a flourishing underground labour market. Any attempt at "sealing" borders without offering more accessible, regular, safe and affordable avenues for migration will continue to fail on a massive scale.

13. It is paradoxical that, in the name of securing their borders, some States have actually lost control of them owing to the fact that flexible and opportunistic smuggling rings are often ahead of the game. Prohibitive and repressive policies, without regular migration channels for asylum seekers and much-needed low-wage migrants, only entrench smuggling operations and underground labour markets, resulting in more deaths at sea and more human rights violations.

14. The militarization of border control, which includes "push-backs" at land and sea, creates unnecessary suffering and violations of human rights and humanitarian law at borders: the vast majority of migrants are innocuous. "Fighting the

[1] Department of Economic and Social Affairs, Population Division, International migrant stock 2015 (see www.un.org/en/development/desa/population/migration/data/estimates2/estimates15.shtml).

smugglers" will remain futile as long as persons in need of mobility, without other options, may avail themselves of the irregular mobility solutions offered by opportunistic smuggling rings. The present escalation in repressive measures does not bode well for migrants: it will push them further underground, into the hands of unscrupulous lenders, recruiters, smugglers, employers and landlords.

15. The only way to effectively reduce smuggling is to offer more accessible, regular, safe and affordable mobility solutions, with all the identity and security checks that efficient visa procedures can provide.

16. States' responses to migration and, more recently, to what is now being termed "the migration crisis" have been ad hoc, short-sighted and inadequate and have led to friction among States, creating an atmosphere of chaos and disorganization that instils fear in the hearts of the citizens of destination countries and feeds all the stereotypes, myths, threats and fantasies that nationalist populist movements exploit with great success.

17. The Special Rapporteur would like to stress that, as a percentage of the world population, the number of migrants remains low. Migrants were only 3.3 per cent of the global population in 2015, compared with 2.8 per cent in 2000. In addition, the rate of migration actually slowed in the period from 2010 to 2015, compared with the previous five-year period. Consequently, despite common perceptions, it is not accurate to designate migration as a "crisis".

18. Unregulated migration in host countries has led to rising anti-migration sentiment, discrimination and violence, as migrants are portrayed as "stealing" jobs and draining social services. Against the backdrop of a poor economic climate, the rise in nationalist populist parties and the tragic terrorist attacks around the world, xenophobia and hate speech have increased, causing a significant upward trend in negative perceptions of migrants and creating a stumbling block in the development of more efficient evidence-based and human rights-based policies.

19. Notwithstanding such negative perceptions, immigration has a minimal impact on unemployment among residents in host countries and a positive overall impact on employment generation and investment: migrants contribute to economic growth wherever they go.[2] Increasing evidence suggests that migrants, including irregular migrants, contribute more in direct and indirect taxes than they receive in the way of services.[3] The use of the appropriate language and studies, the presentation of facts and policies that favour diversity and the inclusion of migrants are key to facilitating their integration and contribution to development and to reducing negative populist representations of migrants.

20. The continued ineffectiveness and paradoxes of border management and the lack of a coherent, human rights-based framework for migration have been vividly and visibly demonstrated by the tragic deaths of migrants in transit, propelling the issue of the human rights of migrants into the spotlight. Although less frequently discussed, suffering is experienced at all other stages of migration.

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[2] Organization for Economic Cooperation and Development, *International Migration Outlook 2013* (Paris, OECD, 2013).

[3] Office of the United Nations High Commissioner for Human Rights (OHCHR), "The economic, social and cultural rights of migrants in an irregular situation", 2014, p. 99. Available from: www.ohchr.org/Documents/Publications/HR-PUB-14-1_en.pdf.

21. The Special Rapporteur proposes a fundamental shift in the way that migration is perceived and framed. Migration itself is a natural part of human existence; it is not a crime, it is not a problem, and it has the potential to be a solution. According to this conception, migration governance is not about closing off borders and keeping people out, but about regulating mobility, that is, opening accessible, regular, safe and affordable migration channels and promoting and celebrating diversity. By governing migration instead of restricting it through the use of "push-backs", interception and detention, we move from a zero-tolerance attitude to one of harm reduction, thereby undercutting the criminal organizations responsible for migrant smuggling, addressing the security concerns of States and, ultimately, reducing human suffering and saving lives.

22. Effectively regulating mobility requires States to develop a much more complex view of why and how people move. States must adopt a whole-system view of migration, taking into account all its aspects, including all benefits and challenges in terms of economic growth, demographic changes, cultural diversity, social integration, personal freedom and respect for the rule of law. A whole-of-government approach is best.

23. States must also develop a long-term strategic vision of how they want their mobility policies and practices to be, 10 to 30 years from now. Preparing such a strategic vision with appropriate consultations in an inclusive and robust public debate, with full recognition of their human rights obligations and respect for the rule of law for all, will allow States to determine the steps needed to achieve their goals, as well as with realistic timelines and the kind of public discourse needed to convince their electorates. Such a vision will only be legitimate if it is placed within a human rights-based framework that will empower all concerned, including all migrants, to test the legality of mobility policies and practices.

24. Taking such a long-term strategic approach in developing the global compact for accessible, regular, safe and affordable mobility policies and practices will place States in a better position to respond to the significant demographic, economic, social, political and cultural challenges that lie ahead.

B. Developing the global compact for safe, regular and orderly mobility

25. All the human rights concerns discussed above are signs of stress within global border management and migration systems. They are clear indications that the status quo is simply not sustainable. Ignoring these warning signs and pouring further resources into ineffective and paradoxical closure systems will lead to further human suffering, as well as wasted resources and lost opportunities, owing to a failure to take advantage of the rewards to be gained from regulated mobility.

26. The Special Rapporteur prefers the use of the term "mobility" over that of "migration". "Migration" has come to embody all the fears of uninformed public opinion. "Mobility" is a more fluid term, usually associated with highly skilled workers: expatriates are "mobile", construction workers are "migrants". Language matters, and changing language is part of changing perceptions. Using the expression "mobility" better encompasses the idea of allowing people to come and go and return, depending on their labour opportunities and personal choices. It may or may not mean settlement or integration.

27. The Special Rapporteur supports the Secretary-General's call to "undertake a State-led process to elaborate a comprehensive international cooperation framework on migrants and human mobility, in the form of a global compact for safe, regular and orderly migration, and to hold an intergovernmental conference on international migration in 2018 to adopt the global compact" (A/70/59).

28. As a response to the proposals made in the above-mentioned report on a global compact, the Special Rapporteur makes the following recommendations, structured in line with the Secretary-General's report, for the development of the global compact, in particular with a view to ensuring that human rights are included and mainstreamed therein.

1. Developing a human rights-based framework that will ensure that the global compact for safe, regular and orderly migration is based on the recognition that all migrants, regardless of their status, must receive the protection, respect and fulfilment of their human rights

29. States assume obligations under international law to respect, protect and fulfil human rights. These obligations are also broadly echoed by the national human rights standards and regional instruments, which apply to all, regardless of nationality or administrative status.

30. A human rights-based framework for migration would ensure the application of these obligations to migrants to protect them from abuse. It is a framework based on the principles of equality and non-discrimination and the duty of States to respect, protect and fulfil human rights, which includes the right to access justice. States must acknowledge that human rights are for all and that migrants should be treated as equal rights holders, regardless of their migratory status in relation to the sovereign territory they find themselves in. When migrants are viewed as equal rights holders, a duty to protect them at all stages of the migration process naturally follows. If violations of these rights occur at any point, migrants need to be provided with access to justice to remedy any discriminatory treatment.

31. The view and labelling of migrants among many stakeholders as "illegal" is counterproductive and is not supported by international law. While migrants who arrive in countries of destination without documents may be in an "irregular situation" or "undocumented" or "unauthorized", they have not committed a criminal act. A human being cannot be intrinsically illegal, and naming anyone as such dehumanizes that person. The conceptualization of irregular migrants as "illegal" has undoubtedly played into the criminalization of migrants and thus to the practice of immigration detention. It has also had an impact on the general public's perception of migrants, legitimizing policies that are not in line with human rights guarantees and contributing to xenophobia, discrimination and violence.

32. The common conception that migrants are "job stealers" is also a harmful stereotype. Economic research demonstrates how migrants complement rather than compete with citizens, generating greater overall productivity within the economy.[4]

[4] David Card, "The impact of the Mariel boatlift on the Miami labor market", *Industrial and Labor Relations Review*, vol. 43, No. 2 (January 1990), pp. 245-257; Mette Foged and Giovanni Peri, "Immigrants' effect on native workers: new analysis on longitudinal data", Institute for the Study of Labour discussion paper, No. 8961, 2015; Andri Chassamboulli and Giovanni Peri, "The labor market effects of reducing the number of illegal immigrants", *Review of Economic Dynamics*, vol. 18, No. 4 (October 2015).

A study[5] undertaken over a period of 14 years into the effects of non-European Union migration on 15 Western European countries showed that, by taking manual jobs, migrants pushed European Union nationals towards more highly skilled and better-paid jobs. A significant increase in more complex skills among nationals was noted. The labour market adjusted with no significant impact on the employment rates for European Union nationals. The impact of the global recession was shown to temper but not eradicate this positive phenomenon, debunking the argument that an economic downturn justifies repressive policies against migrants.

33. Similarly, conceptions of migrants as a "burden" are not based on facts and serve political objectives. Against a backdrop of fiscal and demographic challenges and of austerity policies, discussing external migration as a "burden" and focusing on the need to share this "burden" across different Member States again legitimizes the further securing of borders and encourages negative public attitudes. Economic studies demonstrate that, as workers, consumers and taxpayers, migrants contribute to the economic growth of societies, with very limited downside effects (see A/HRC/29/36). In fact, the perceived "burden" of migration comes predominantly from the financial, technological and human resources necessary to implement counterproductive national security-focused policies and to deal with their unintended, although foreseeable, secondary effects.

34. Acknowledging that migrants are human beings with rights, States should be talking about sharing a "responsibility", not a "burden", and considering the costs for welcoming refugees and migrants as an investment, not an expense. All studies show that the return on the investment is well worth it.

35. A global compact based on the core principles and provisions of international and regional law could stop the widespread suffering of migrants in transit, at borders and in destination countries. Applying the United Nations core values to policies based on fact rather than fiction would lead to migration policies that facilitate mobility and promote diversity. The development of a global compact with a long-term vision supporting a human rights-based framework will become increasingly vital to the internal and external interests of States as they face demographic, societal and labour market challenges. Committing to a global compact that recognizes the benefits of mobility will provide better protection for the human rights of migrants and will better equip States to sustain recovery, encourage growth and further develop global competitiveness.

36. Fully implementing a global compact relying on a human rights-based framework for regular migration therefore involves a number of policy orientations, including:

(a) Increasing search-and-rescue capacity;

(b) Developing rights-based alternatives to detention and expeditiously and completely ending the immigration detention of children and families;

(c) Considerably reducing underground labour markets and exploitation in the workplace over the coming decade, as they act as a magnet for irregular migration at the request of exploitative employers;

[5] Francesco D'Amuri and Giovanni Peri, "Immigration, jobs and employment protection: evidence from Europe before and during the Great Recession", Bank of Italy working paper, No. 886 (University of California, Davis, 2012).

(d) Facilitating unionization for all migrant workers regardless of their status, effective access to justice for all migrants and respect of the rule of law for all, including migrants;

(e) Implementing "firewalls" between immigration enforcement and public services such as police services, health care and education for all migrants, regardless of their status;

(f) Reinforcing labour inspection mechanisms to enforce the rights of all workers, including migrant workers, whatever their status;

(g) Creating multiple labour migration opportunities, including for low-skilled migrants, to incentivize migrants to use regular migration channels, through visa and work permit regimes.

37. Smugglers and exploitative employers are currently facilitating the labour mobility that many labour markets need in order to thrive. Through creative visa opportunities for work at all skill levels, including for low-wage migrants, States could considerably reduce the number of migrants arriving through irregular means or overstaying their visas or permits. Coupled with entry and exit controls and other supporting initiatives, multi-year and multi-entry visas could incentivize migrants to come to countries of destination for work and return to the country of origin while respecting visa conditions. Encouraging mobility, including for employment, family reunification and education, will reduce irregularity.

38. The successful implementation of such a policy mix requires challenging the many intersecting and negative perceptions of migrants and migration that have pervaded public debates, policies and politics. The overreliance on securitization rests on the assumption that sealing international borders is possible, when the unsustainable status quo shows that it is not. Developing the global compact will require continued political commitment and creative policy developments.

2. Building on existing bilateral, regional and global cooperation mechanisms

39. Migration governance has become increasingly informal, ad hoc, non-binding and State-led, largely falling outside the United Nations framework in forums such as the Global Forum on Migration and Development and regional consultative processes. This leads to a lack of accountability, monitoring and oversight and the absence of a relationship with the formal normative monitoring mechanisms established within the United Nations.

40. Although such informal forums serve the purpose of initiating and sustaining conversations on migration issues between States, there is also a need to enhance the human rights dimension of global migration governance, including in terms of accountability, and to bring it into the United Nations framework, including by establishing an institutional framework on migration based within the Organization.

41. There has been considerable recognition of and interest in the issue of migration governance over the past decade. The two High-level Dialogues on International Migration and Development, with a third to be held by 2019, the thriving Global Forum on Migration and Development, the coordination work of the Global Migration Group, the growth in IOM membership, the development of regional initiatives, through both regional organizations and regional consultative processes, and the decision to hold the high-level plenary meeting of the General

Assembly on addressing large movements of refugees and migrants in September 2016 all testify to that interest.

42. Better global migration governance would be advantageous for all States because they cannot deal with a global phenomenon on a unilateral, bilateral or even regional basis alone. Enhanced governance would allow for a better sharing of responsibilities on the part of States associated with migration. More cooperation on migration governance does not mean less territorial sovereignty.

43. While the Global Forum on Migration and Development provides a useful platform for informal discussions between States, it should not be seen as a substitute for discussions about migration at the United Nations. More frequent high-level dialogues could lead to closer linkages and synergies between discussions within the United Nations and those outside.

44. The work of the Global Forum on Migration and Development has improved to include more focus on human rights, using the expertise of the Global Migration Group and the United Nations human rights mechanisms to a greater extent and allowing for enhanced participation by civil society. It could further benefit from more concrete outcomes, for example through the adoption of a formal outcome document at each meeting and the establishment of a mechanism for follow-up and monitoring of the implementation of its recommendations. Participation by civil society organizations could be further enhanced by increasing their involvement to a full day, with their deliberations being taken up during the course of the meeting, and ensuring their participation at all round tables during days reserved for the participation of Governments.

45. The High-level Dialogue on International Migration and Development is an important opportunity to reflect on the mainstreaming of human rights into all aspects of the migration debate. States should consider holding more frequent high-level dialogues, for instance every three years, which should be interactive and action-oriented, each with a rights-based negotiated outcome document that would include a plan of action and a mechanism for follow-up and implementation monitoring.

46. Human rights must be a cross-cutting issue that informs all discussions at the High-level Dialogue, and, as outlined in the 2013 report of the Special Rapporteur (see A/68/283), States should consider raising issues such as:

(a) Decriminalization of irregular entry and stay;

(b) Development and implementation of rights-based alternatives to detention, especially for children and families with children;

(c) Awareness-raising of the human rights of migrants;

(d) The fight against xenophobia, discrimination and violence against migrants, in acts and speech;

(e) Refraining from referring to migrants as "illegal" regardless of their migration status;

(f) Effective protection of the human rights of vulnerable groups, such as unaccompanied children, families with children, persons with disabilities and elderly migrants;

(g) Enjoyment of all economic, social and cultural rights, including the right to education, health, social security and adequate housing, as well as labour rights, for all migrants, including irregular migrants;

(h) Protection of the human rights of migrants at borders,[6] both at entry and during expulsion procedures;

(i) Effective access to justice for all migrants, whatever their status.

47. Regional mechanisms are becoming an important feature of the global migration governance architecture.

48. Agreements on the free movement of persons have created open mobility regimes, such as in the European Union and the Southern Common Market (MERCOSUR). However, with the recent "Brexit" vote, it is clear that migration under such regimes can create resentment and fears that can be fuelled by political discourse. With appropriately informed public debate, expanding and linking such freedom-of-movement zones should become a priority.

49. Mobility agreements between a freedom-of-movement zone and an external country are prominent in the recent European Union dialogue about its migration and border management policies, encompassing a broad range of issues, from development aid to temporary entry visa facilitation, circular migration programmes and the prevention of irregular migration, including cooperation on readmission. Transparent and effective monitoring and accountability mechanisms would enhance their legitimacy.

50. While the growing number of regional consultative processes are important trust-building exercises, they can also lead to contradictions and lack of accountability and oversight, especially when such processes trigger changes in policy and practice that affect the rights of migrants. Regional consultative processes should be developed to take in issues beyond border control, interdiction and return, including cooperation on the protection of migrants' rights and on expanded visa liberalization and facilitation, in order to develop accessible, regular, safe and affordable mobility solutions for migrants at all skill levels.

51. Regional organizations, regional consultative processes and bilateral agreements contribute usefully to global migration governance and serve as laboratories for policy initiatives. However, under a human rights-based framework, and taking into account the consequences of their decisions on the lives and rights of migrants, States have the duty to ensure that bilateral and regional arrangements are transparent, and that they respect, protect and promote human rights and ensure accountability, especially in favour of migrants.

52. A number of trade agreements contain clauses relating to the mobility of persons, although they oftentimes refer only to executives and highly skilled expatriates. Such clauses should be expanded to cover migrants at all skills levels and should be inserted in a human rights framework, which would improve their coherence. Such clauses should include rigorous due diligence, monitoring and oversight mechanisms.

[6] See OHCHR Recommended Principles and Guidelines on Human Rights at International Borders, 2014. Available from: www.ohchr.org/EN/Issues/Migration/Pages/InternationalBorders.aspx.

53. Trade agreements should reflect the human rights obligations of States, and agreements that undercut existing social protections should not be ratified. Introducing a human rights-based approach to trade, which offers migrants' representatives meaningful opportunities to comment during trade negotiations, would also acknowledge and empower migrants as key stakeholders in trade issues. The recent work of the Office of the United Nations High Commissioner for Human Rights (OHCHR) in support of a human rights impact assessment of the Continental Free Trade Area project demonstrates the value of such impact assessments in identifying and mitigating human rights violations, while pointing out opportunities for the upgrading of skills.

54. Trade agreements can also provide for a whole-of-government approach to monitoring and enforcing the agreement's terms. Similarly, the inclusion of regulated recruitment systems and shared migration databases in trade agreements, as Viet Nam and Malaysia have done, can help coordinate mobility and ensure that low-wage workers are placed in employment that better matches both their skills and qualifications and the labour needs of employers.

55. States should not only sanction employers and others who engage in unethical behaviour, but also introduce incentive systems for improving working conditions, as are included in the trade agreement between the United States of America and Cambodia. The MERCOSUR and Ibero-American agreements have also strengthened the economic, cultural and social integration of migrants by enhancing the portability of social security and other acquired benefits.

56. Once the proper legal framework is in place, migrants will also have greater capacity to protect themselves in times of crisis and vulnerability, especially when they can directly access domestic courts and tribunals to address rights violations in the context of trade. Working with civil society, trade unions and the private sector is essential to improving human rights and labour rights protections for migrants.

3. Developing more opportunities for safe, orderly and regular migration, in line with target 10.7 of the Sustainable Development Goals, including labour mobility at all skill levels that is responsive to labour market needs, as well as family reunification and education-related migration opportunities

57. Large-scale mobility is inevitable and necessary for the growth and development of a globalized economy that demands global production and a global workforce. Businesses and employers are keen to reduce costs and maximize profits. This frequently comes at a human cost, especially for migrants in an irregular situation, who are often constrained by circumstances to perform tasks at great financial, physical or even psychological cost to themselves (see A/HRC/26/35). Thus far, the efforts of States have been ineffective when it comes to monitoring and sanctioning businesses that exploit migrants for their cheap labour, often in dirty, difficult and dangerous working conditions.

58. Globally, in sectors where regulation is inadequate, such as domestic work, care, construction, agriculture, the garment industry, food processing and packaging, fisheries, extraction and hospitality, migrants unable to get work permits arrive irregularly and are vulnerable to economic exploitation, abuse and violence. States are well aware of this fact, but can do little to reduce the levels of exploitation, and employers take advantage of the fact that migrants rarely complain, mobilize or contest, owing to their lack of status, political capital or access to justice.

59. Although some migrants, such as children, older persons, women travelling alone and migrants with disabilities, are vulnerable, the majority are not intrinsically vulnerable. On the contrary, they are most often incredibly resilient and courageous, making life-altering decisions on a regular basis. However, through policy and practice decisions that result in a lack of effective access to justice, States may create precarious conditions of legal status or regulatory frameworks that allow many to abuse and exploit migrants with impunity. For example, there are cases in which temporary migrant worker schemes do not provide for adequate oversight mechanisms; countries that rarely enforce the prohibition of recruitment fees, leading to situations of debt bondage, and rarely streamline their labour recruitment industry to ensure it effectively protects the rights of migrants; and labour inspection mechanisms that collaborate with immigration enforcement to expel undocumented migrants rather than try to enforce labour standards against the exploitative employers of such migrants.

60. Consequently, when speaking generally of migrants, the Special Rapporteur has come to use the word "precarious", which refers more to the situation they are in, constructed as it often is, rather than the word "vulnerable", which connotes more their intrinsic characteristics.

61. It is important that all States establish human rights-based, coherent and comprehensive national migration policies. These policies should address the "pull" factors for irregular migration, namely the unrecognized need for migrant labour in destination States, including for low-wage workers, and the corresponding need to open up a greater number of regular migration channels.

62. Little attention has been given to the impact of labour market dynamics in destination countries as pull factors for irregular migration. Member States should be weaned of their reliance on cheap labour in specific economic sectors and should ensure labour rights are upheld for all, including documented and undocumented migrants, through the full implementation of sanctions against employers and rigorous labour inspection. Long-term investment in the enforcement of labour standards and human rights for all workers, whatever their status, will allow States to respond to labour shortages in an efficient and regulated way, thus increasing global competitiveness and leading to less labour exploitation, less irregular migration, less migrant smuggling and less loss of life.

63. A well-organized migration policy based on mobility and human rights could also help States to enhance their development impact. In 2015, migrants sent approximately $432 billion in remittances.[7] Migrants who moved from countries with a low human development index to countries with a higher development index experienced, on average, a 15-fold increase in income, a doubling in education enrolment rates and a 16-fold reduction in child mortality.[8] If the human rights of migrants are effectively respected, protected and promoted within well-regulated migration processes, such development outcomes can be greatly enhanced.

[7] Dilip Ratha, Supriyo De, Sonia Plaza, Kirsten Schuettler, William Shaw, Hanspeter Wyss and Soonhwa Yi, "Migration and remittances: recent developments and outlook", Migration and Development Brief 26 (Washington, D.C., World Bank, 2016).

[8] United Nations Development Programme, *Human Development Report 2009: Overcoming Barriers — Human Mobility and Development*. Available from: http://hdr.undp.org/sites/default/files/reports/269/hdr_2009_en_complete.pdf.

64. The Special Rapporteur recommends that States develop and incentivize accessible, regular, safe and affordable migration channels at all skill levels and consider a variety of options for regular migration, such as humanitarian visas, temporary protection, family reunification, work permits at all skill levels, as well as for migration for job seeking, student mobility and medical evacuation. States can also increase the number of migrants admitted under existing regular migration schemes, including for seasonal workers and student visas.

65. The Special Rapporteur underlines that it is important for States to ensure inclusive processes that allow for a robust public debate, including through national consultations, and that promote a better understanding of the needs of migrants in terms of human and labour rights protection. This will allow States to develop more targeted programmes and more suitable mobility options and to measure effective progress for migrants, especially those who are socially marginalized, economically excluded and politically invisible. Such processes and data collection will constitute an important contribution to the 2030 Agenda for Sustainable Development.

4. Ensure that migration opportunities entail: the ethical recruitment of migrants; reduction in the costs of migration; facilitation of the flow of remittances, and increasing their productive use; enhancement of the transfer of skills and knowledge; mutual recognition of skills and portability of acquired benefits, as addressed in the Addis Ababa Action Agenda; and efforts by Member States to counter the exploitative practices and the demand for services derived from the exploitation of others, in line with international human rights and labour standards

66. Abuses of the rights of migrant workers are not isolated incidents taking place in a vacuum. First, unethical recruitment practices thrive in an environment in which the prices of goods and services are dependent upon a supply of cheap labour. Ethical recruiters struggle to compete within a system that has adapted to the vicious cycle of wholesale exploitation and systematic suffering.

67. Second, the systematic use of exploitative labour is becoming part of the conceptualization of economic development of both countries of origin and destination. As countries accelerate their growth and build infrastructure based on cheap labour, international migration of low-wage workers is embraced as a tool of development without due attention to the human rights of migrants themselves.

68. This can be seen, for example, in how temporary migration schemes are frequently discussed, in international forums such as the Global Forum on Migration and Development, as positive examples of flexible labour supply responding quickly to economic demands, despite countless examples of built-in structural precariousness and of negative human rights consequences.

69. Destination States accept and become complicit in this economic normalization of the exploitation of migrant workers because of a desire to remain globally competitive. Countries of origin can also fail to negotiate adequate protections for their nationals owing to power imbalances between countries. Examples have been reported of countries of origin that have requested better treatment for their nationals only to see the number of their citizens obtaining visas as migrant workers drop.

70. Consequently, migrants make a realistic assessment of the options offered to them and factor the recruitment system into their plans for migration, thus accepting negative consequences and further embedding the normalization of exploitation and suffering. Their choices are limited, as their immediate objective is sending money home to repay any debt incurred and to put bread on the family table.

71. In this respect, States must ensure that exploitative employers are sanctioned and that migrants, including those in an irregular situation, are empowered to defend their own rights through effective access to justice in national courts, tribunals and dispute-settlement mechanisms, with the assistance of unions, interpreters and legal assistance.

72. States must transition to an ethical migrant labour recruitment system based upon the Guiding Principles on Business and Human Rights and the wealth of human rights instruments, labour standards and soft law norms. This must take into account the rights and needs of migrant workers and the benefits of facilitated mobility and incentivize accessible, regular, safe and affordable labour mobility. States must also determine the regulatory environment in which employers recruit and use migrant labour. The key elements of such a transition include:

(a) Banning of recruitment fees;

(b) Effective regulation, licensing and monitoring of recruiters;

(c) Harmonization of the legal and policy frameworks relating to recruitment.

73. Voluntary compliance is not enough to protect the rights of migrants, and sustained political will is needed to ensure that Governments use their legislative, policymaking, investigative and judicial powers to protect the rights of individuals, regardless of nationality or status.

74. International and regional cooperation is essential to transition to an ethical system, as the playing field must be levelled in order to make progress. No one country alone will be able to end exploitative and abusive recruitment. Member States must develop a level playing field for all recruitment agencies, using initiatives such as the International Labour Organization (ILO) Fair Recruitment Initiative and the IOM International Recruitment Integrity System.

75. Governments should engage with the private sector. There is a strong business case for a transition to an ethical recruitment system for a number of reasons, including the consequent reduction in reputational and legal risks, and greater efficiency and productivity gains within business operations and the extended supply chain. Governments, international organizations and business associations must use this business case alongside key international legal and policy standards to engage with the private sector, raise awareness within it on the issues and determine the steps needed to achieve a wholesale transition to an ethical recruitment system.

76. In turn, the private sector must fully comply with all relevant international human rights and labour standards and fully implement the Respect, Protect and Remedy framework within the Guiding Principles on Business and Human Rights in relation to migrant workers, by, inter alia, developing a zero-tolerance policy on the payment of recruitment fees by workers, auditing supply chains and ensuring human rights due diligence with all contractors and subcontractors.

77. Empowering migrants through information and support can harness their resourcefulness to drive progress towards a system of fair and ethical recruitment. Migrants must understand their rights and be empowered to make decisions about recruiters based upon robust intelligence about different actors in the market. Recognizing migrants as rights holders, acknowledging the benefits that they bring to destination countries and facilitating their integration into society is key to instituting a system of fair recruitment for international labour migration. Failing to recognize the huge value of migrant workers and to support their integration legitimizes abuse and exploitation.

78. The alliance of migrants' resourcefulness, the business community's desire for a level playing field and the political will of Governments should result in egregious recruitment practices becoming mostly a thing of the past.

5. Ensure the inclusion in the global compact of migrants and their specific vulnerabilities and needs, in coordinated humanitarian response and development frameworks at all levels, by ensuring the rights of migrants are upheld, the financial and human resources necessary to support such efforts are mobilized and development funding is expanded for measures to support the positive contribution of migrants to the societies in which they reside

79. In a number of human rights conventions, including the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, it is recognized that everyone has the right to an effective remedy from the competent national tribunals for acts violating the fundamental rights granted to him or her. Despite these international protections, many migrants face serious barriers in accessing remedies when their human rights are violated.

80. Systemic barriers to access to justice can compound abuses of migrants' rights, including through: a lack of local language skills; limited information about rights and means of redress; lack of unionization or representation; geographical constraints; restrictions of migrants' freedom of movement; fear among migrants of retaliation or economic loss if they make complaints against abusive recruiters, employers or landlords; long processing times for complaints; a general practice by recruiters or employers of deliberately not providing migrants with documents that could prove exploitation; the fragmentation of enforcement power for different rights across various judicial and non-judicial mechanisms; the growth of non-judicial remedies; a lack of access to a competent lawyer; and a lack of legal aid.

81. Significant resource constraints contribute to the unwillingness of States to prioritize and invest in facilitating access to justice for migrants, such as legal aid and translation and interpretation services. Migrants' fear of detection, detention and deportation if they assert their right to access justice is also a key barrier. Additionally, inconsistencies in access to justice persist, depending upon the rights at stake, the type and nationality of the migrants and the jurisdiction. Finally, a lack of specific rules on the duty of courts to apply sanctions and/or compensation for violations of migrants' human rights or labour rights is another significant barrier.

82. The Special Rapporteur notes a promising trend in relation to access to justice, as national and regional jurisdictions appear willing to support migrants fighting for their rights in cases when migrants have been able to overcome all the hurdles put in

their way and bring their cases before a court of justice. States must remove barriers to access to justice, ensuring that migrants can effectively — and not simply on paper — access legal remedies for violations of their rights. Facilitating access to justice without fear of detection, detention or deportation would go a long way towards, on the one hand, legitimizing new migration policies by showing that territorial sovereignty and human rights are not incompatible, and, on the other, changing mentalities regarding migration through fighting stereotypes. When migrants actually go to court, courts often listen, and when courts say migrants have rights, citizens often listen. Conversely, States must ensure that labour inspections target exploitative employers rather than exploited migrant workers.

83. States should also implement "firewalls" between immigration enforcement and public services, thereby allowing for access to justice, housing, health care, education, social and labour services for all migrants, whatever their status, without fear of detection, detention and deportation, as recently recommended by the Council of Europe.[9]

84. States must also ensure that all migrant workers, irrespective of their skill level, job sector or administrative status, are protected by labour standards, and should facilitate the unionization of all migrant workers, regardless of status, in order to ensure their effective empowerment to defend their own rights.

85. Furthermore, States must improve accountability for violations of the rights of migrants, including by strengthening the capacity of national human rights institutions and ombudspersons.

86. Improving disaggregated data collection and indicators in all areas relevant to migration while ensuring data protection will allow for States to make better-informed policy decisions.

87. The Special Rapporteur is concerned about the extensive use of detention as a border management and deterrence tool against migrants, as it is too often also used to prevent migrants' access to justice.

88. The Special Rapporteur stresses that, upon arrival, all irregular migrants should have proper individual assessments carried out for all their human rights protection needs, and not only for those who are manifestly refugees and victims of trafficking: children, families with children, pregnant women, persons with disabilities or illnesses and elderly migrants also have need of protection. Quick screening processes should not increase the risk of refoulement for those needing protection.

89. After making what are often extremely long, dangerous and arduous journeys, many irregular migrants and asylum seekers are uselessly subjected to immigration detention. Immigration detention can be in contravention of international human rights law. Freedom should be the default position and detention must be reasonable, necessary, proportionate and decided on a case-by-case basis. As irregular migration is not a criminal act, detention based simply on the lack of

[9] European Commission against Racism and Intolerance, General Policy Recommendation No. 16, *On Safeguarding Irregularly Present Migrants from Discrimination*, adopted 16 March 2016. Available from: www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N16/REC-16-2016-016-ENG.pdf.

administrative status is illegal.[10] Administrative detention can only be justified if an individual presents a danger to the public or risks absconding when their presence is necessary in further proceedings. Such determinations must be done individually and be based on some kind of evidence. Any detention that does not respect such parameters is illegal. Furthermore, when detention becomes a routine measure of border enforcement, it may be, per se, arbitrary insofar as it is neither an exceptional measure of last resort, nor based upon a meaningful, individualized assessment of risk.

90. Additionally, there are human rights concerns relating to the impact of detention. Prolonged detention without a legal basis has been shown to have a devastating effect on the physical and mental health of migrants and asylum seekers, for example by contributing to post-traumatic stress disorder, anxiety and depression. This is frequently compounded by unacceptable conditions of detention, such as overcrowding, unsanitary toilet and shower facilities and unhygienic kitchens, as well as by scarce access to health care, family members, lawyers, international or civil society organizations, or physical and recreational activities.

91. Long periods of immigration detention can also lead to serious delays for migrants in claiming their economic and social rights, even after having been released. Research by the Office of the United Nations High Commissioner for Refugees (UNHCR) suggests that detention disempowers migrants, who are often keen to work, owing to a sustained absence from the labour market and the emotional and mental toll of detention.

92. Of particular concern is the frequent presence of children in detention. Children are usually afforded additional protections by States and, according to many national policies, should not be detained. However, the Special Rapporteur has witnessed detained children in all the countries he has visited, some of which have absurdly justified such detention by calling it protective custody.

93. When the age of the child is unknown, which is common when they are undocumented or coming from countries without robust birth registration systems, they are often detained until their age can be verified, which can take weeks or months. In some instances, while in detention, unaccompanied children live and sleep alongside adults, without any special accommodation made for their young age and without access to education. In others, families are separated in different sections of the detention facility according to age and gender.

94. The detention of children, even for short periods, can have severe psychological consequences. It has been made clear by the Committee on the Rights of the Child and reinforced by other human rights mechanisms that immigration detention can never, ever, be in the best interest of a child and that the immigration detention of children, whether unaccompanied or together with their families, constitutes a violation of child rights. Consequently, both unaccompanied children and families with children should always benefit from alternatives to detention.

[10] CMW/C/GC/2, para. 2; Inter-American Court of Human Rights, *Vélez Loor v. Panama*, para. 171; Inter-American Court of Human Rights, *Pacheco Tineo v. Bolivia*, para. 131; and Court of Justice of the European Union, *Sélina Affum v. Préfet du Pas-de-Calais*.

95. Many rights-based alternatives to detention exist.[11] A number of countries have moved towards open reception facilities, particularly for vulnerable migrants such as unaccompanied minors and families. However, prolonged immigration detention and its associated negative human rights consequences continue in many countries.

6. The responsibility of States to protect and assist their citizens abroad, including by ensuring proper documentation for their protection and their right to re-entry, as contemplated in the Vienna Convention on Consular Relations, and establishing bilateral and regional consular cooperation arrangements, where needed

96. Consulates can add to the difficulties faced by their nationals, as they may show reluctance to support their efforts in pursuing judicial remedies so as not to affect their competitiveness in the international labour recruitment market. Consular support should always be available to migrants in countries of destination[12] so that they are able to access information and assistance on alternatives to exploitative situations and on access to justice and social protection services (see A/70/310).

97. Countries of origin should provide prospective migrants with information on regular migration channels, the risks associated with irregular migration and the recourse available to them in cases of abuse and exploitation. Pre-departure and post-arrival training should be seen as part of an entire curriculum of education developed cooperatively by countries of origin and destination. The Special Rapporteur is aware of countries such as the Philippines that offer and provide such support to their nationals.

98. Consular staffing should be strengthened within missions in countries of destination in order to: allow them to increase the scope of their work, give more attention to combatting the practices of unscrupulous recruiters, respond more effectively in order to protect and promote the rights of migrants and members of their families, where necessary, and provide, in particular, the necessary assistance to any migrants deprived of liberty or subjected to an expulsion order.

7. Stressing, in the global compact, that the return of migrants who do not meet the required international or national legal standards to remain in their host country must be conducted in safety, dignity and respect for human rights, on the basis of: (a) the primacy of voluntary returns; (b) cooperation between States of origin and reception; and (c) enhanced reception and reintegration assistance to those who are returned

99. The Special Rapporteur noted, in recent international conversations, an increased focus on the return of migrants not benefiting from refugee protection. Certainly, refugees need protection in accordance with the 1951 Convention relating to the Status of Refugees. However, all migrants need the protection of their rights in accordance with international human rights law and international labour law, in particular in cases of detention, physical or mental abuse, labour exploitation, forced labour, return to torture, sexual and gender-based violence, separation of families, privacy and the protection of children.

[11] R. Sampson, V. Chew, G. Mitchell and L. Bowring, *There Are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention*, revised ed. (Melbourne, International Detention Coalition, 2015).

[12] United Nations, *Treaty Series*, vol. 2220, No. 39481; CMW/C/GC/2.

100. The international human rights and labour law regimes protect everyone, including refugees. In some cases, refugees are better protected under the human rights regime than under the refugee regime. The right to education enshrined in the Convention on the Rights of the Child and the absolute prohibition of a return to torture enshrined in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which also contains the principle of non-refoulement, are cases in point. The tools needed to protect all such rights are often similar, whether the foreigner in question is a refugee or another kind of migrant, and consist of access to justice; adequate national human rights institutions and ombudspersons; access to lawyers and legal aid mechanisms; detention-monitoring mechanisms; and oversight mechanisms for cases of repressive administrative action, for example in airports, ports, detention centres or police custody.

101. Upon arriving undocumented in countries of transit or destination, all migrants and refugees fall within the category of irregular migrants and are often treated as such. Proper individual assessments for all are required in order to effectively identify their vulnerabilities and the legal framework under which their need for protection will fall.

102. Readmission agreements are an area of particular concern. Despite protections against such practices in legislation, push-backs and refoulement to countries of origin and third countries with a weak rule of law and poor asylum systems have been improperly conducted under the broad auspices of bilateral agreements.

103. The Special Rapporteur stresses that no one should be returned under a readmission agreement without effective oversight by a post-return human rights monitoring mechanism that ensures that the human rights of returnees are actually respected.

104. Special procedures and safeguards must be established for the return of unaccompanied or separated children. States should only return or repatriate unaccompanied children as a measure of protection — for instance, to ensure family reunification in cases in which it is in the child's best interest and after due process of law. Decisions on the return of unaccompanied children should be taken by child protection officers or — only in cases in which that is not possible — well-trained migration officials who understand children's rights and needs.

8. To initiate a State-led, consultative process to improve protection and assistance for migrants in vulnerable situations, with the participation of experts and civil society, building on the principles and practical guidance on the protection of migrants in large movements currently being developed by the Global Migration Group

105. As demonstrated throughout the tenure of his mandate, the Special Rapporteur believes in the importance of a State-led, consultative process and proposes, including relevant United Nations agencies, United Nations and regional human rights mechanisms, civil society organizations and migrant communities in that process.

106. The Special Rapporteur also takes note of the principles and practical guidance on the human rights protection of migrants in precarious situations within large and/or mixed movements established by the Global Migration Group's working group on human rights and gender equality, in partnership with agencies of the United Nations system, civil society, academia and States, which are intended to

address human rights protection gaps for migrants. The guidance could form an important part of the global compact, as it is derived from existing obligations under international law and seeks to assist States and other stakeholders with regard to the development, strengthening, implementation and monitoring of measures to protect migrants in vulnerable situations and in large and/or mixed movements. As demonstrated herein, the Special Rapporteur has contributed to this effort, and believes in the importance of such a consultative process and guidance to assist States and other stakeholders in the implementation of their human rights obligations in devising rights-based responses to large-scale, irregular and precarious movements.

9. Giving favourable consideration to incorporating into national policies and practices the insights of the State-led Migrants in Countries in Crisis Initiative to protect and assist migrants in countries experiencing conflicts or natural disasters and of the Nansen Initiative in its agenda for the protection of persons crossing international borders as a result of natural disasters and climate change, and continuing to develop such initiatives

107. The Special Rapporteur supports such initiatives and notes that a broader framework based on human rights for all migrants is required to encompass these initiatives so as to guarantee a more holistic approach.

10. Forging a closer relationship between the United Nations and the International Organization for Migration, including through a strengthened legal relationship

108. The recent unprecedented numbers of irregular migrants seeking safety and security serve to underline the fact that, despite the existence of legal frameworks on migration issues, a comprehensive framework for migration governance is still lacking. Given that migration is a natural human phenomenon unlikely to end in the foreseeable future, and as stated in the Special Rapporteur's 2013 report to the General Assembly on global migration governance (see A/68/283), the United Nations must be involved to a greater extent in the debate on global migration governance, ensuring that proper attention is given to the human rights of migrants.

109. Owing to the lack of a comprehensive framework, global migration governance is fragmented with different institutional approaches and normative frameworks relating to specific aspects of migration, such as the human rights of migrants, the smuggling of migrants, refugees and asylum seekers and labour migration.

110. The Special Rapporteur observes that the reluctance of States to strengthen migration governance seems to be based on the misconception that this will limit their sovereignty. States have the power to determine who enters and stays in their territory. More governance does not mean giving up this sovereignty. On the contrary, States would have more control if there were more migration governance. More governance simply means improving the coordination and cooperation between States, leading to better governance over migration that would better respect human rights, thus further protecting States from allegations of human rights abuses against migrants.

111. As the scope and complexities of migration continue to grow, the alternative to more robust global migration governance is a highly unregulated system, with a range of uncoordinated actors, including from the private sector. In reality, State sovereignty is more challenged by insufficient global migration governance, which facilitates the role of other actors, such as exploitative migrant smugglers and

employers, who are currently providing migrants with mobility solutions regardless of State policies.

112. Migration is multidimensional and it is often conceptualized together with other aspects of globalization. However, those who are most affected by migration are the migrants themselves, who are human beings with inalienable human rights, which States have committed to respect in the Universal Declaration of Human Rights and the human rights treaties and international labour conventions to which they are parties. Thus, migration cannot be conceptualized without human rights, and any framework for migration governance must duly take into account the human rights of migrants.

113. Any future model for global migration governance should encompass several functions, including: standard-setting and normative oversight; capacity-building and technical assistance; a platform for dialogue, collaboration and political facilitation; and the development of a knowledge base or capacity through data, indicators and dissemination. These functions are currently carried out by a wide range of actors, both inside and outside the United Nations framework.

Integrating the International Organization for Migration into the United Nations, with a revised mandate

114. IOM already works very closely with the United Nations, including as a member of the Global Migration Group, and in many countries IOM is part of United Nations country teams. Integrating IOM into the United Nations would thus allow the United Nations to benefit from its vast experience and expertise.

115. However, the IOM Constitution does not include a protection mandate. In order for IOM to be properly integrated into the United Nations, its Constitution should be revised. IOM should be given an official human rights protection function, and the United Nations human rights framework should be referred to in its Constitution. This would allow IOM to measure its policies and practices against a clear, binding normative framework and ensure that all projects funded by States and implemented by IOM are negotiated in respect of that framework.

116. As human rights are at the core of migrants' social, economic and legal condition, IOM cannot become the leading international organization on migration unless it has a clearly defined legal human rights protection framework against which to measure the legitimacy of its policies and practices. The argument put forward by many, according to which IOM would work with States on migration policies while the United Nations would address the human rights of migrants, makes little sense from a human rights perspective: mainstreaming human rights into migration policies is the only way to achieve the desired result of ensuring that the human rights of migrants are actually respected, protected and promoted by all.

117. In his 2013 report, the Special Rapporteur recommended that this constitutional change be operationalized as IOM becomes integrated into the United Nations. He notes that an agreement between States appears to have been reached for such integration without this specific constitutional change, and therefore now proposes that the issue of the updating of the IOM Constitution be included in the agenda for the 2018 follow-up United Nations conference on migration.

118. In addition, the IOM human rights framework and independence would be reinforced if predictable core funding were made available. Currently, more than 98 per cent of IOM funding is in the form of voluntary contributions for earmarked projects. Therefore, donor States have an important role in determining the

organization's work and priorities. Core funding would allow IOM to initiate projects according to its own priorities, rather than mostly implementing donor-driven undertakings.

119. Furthermore, the integration of IOM into the United Nations system must include a deepening of the cooperation between IOM and all other relevant United Nations entities and agencies working on migration, in particular those that have a defined protection mandate, such as OHCHR, UNHCR, ILO, the United Nations Office on Drugs and Crime (UNODC), the United Nations Entity for Gender Equality and the Empowerment of Women (UN-Women), the World Health Organization (WHO) and the United Nations Children's Fund (UNICEF). IOM must also develop very clear mechanisms for collaboration and coordination with civil society.

120. The idea of requesting IOM to support the ratification and implementation of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families should also be discussed. The Convention, which has garnered few ratifications, would benefit from an institutional champion able to muster adhesion to its principles. Such a responsibility would contribute to strengthening the human rights culture within IOM and provide it with an appropriate normative tool to measure its action and to negotiate projects with States. IOM would thus complement the important work of the Committee on Migrant Workers, in the same way that UNICEF and the Committee on the Rights of the Child complement each other's work on the implementation of the Convention on the Rights of the Child.

IV. Conclusions and recommendations

121. **The events in the Andaman Sea, the Asia-Pacific region, Central America, the Mediterranean Sea and the Middle East, as well as the mirroring of such suffering at each stage of the migratory process over the past three few years, have clearly shown that the status quo in approaches of States to border control, asylum and migration is not sustainable if the objective is to reduce suffering and deaths.**

122. **The commitments of States to regional and international human rights systems and other normative standards clearly show that they have the potential to collectively initiate and develop a global leadership role on the issue of migration policies and practices, a role which remains vacant at present.**

123. **The global compact should:**

(a) **Recognize the need for a stronger human rights-based normative and institutional framework for migration at the United Nations, which will, in turn, have a positive effect on informal migration governance outside of the United Nations;**

(b) **Outline clear short-, medium- and long-term goals that articulate a shared vision for the global compact on how to facilitate migration and mobility, as requested in the 2030 Agenda for Sustainable Development. Such goals must be developed in full recognition of the push and pull factors of irregular migration and responsibilities of States for managing and mitigating them;**

(c) Assist States in developing strong and effective labour law frameworks (including on labour inspection, unionization and collective bargaining) protecting the rights of all workers, including migrant workers, regardless of status, and in ensuring effective access to justice for migrants whose labour rights or human rights have been violated;

(d) Ensure that States adopt measures to facilitate accessible, regular, safe and affordable migration and mobility channels at all skill levels, as well as family reunification and the regularization of undocumented migrants;

(e) Support the strategies of States, through fact-based analysis and long-term strategic thinking, to counter the conceptualizations of migration that underpin toxic public debates and counterproductive and ineffective security policies and needlessly result in the stigmatization, marginalization and criminalization of migrants, and integrate such analysis in developing means of public communication and elements of education curriculum in favour of migration, mobility and diversity;

(f) Integrate IOM into the United Nations system, with a process leading to the updating of its Constitution in order to include in it a strong human rights protection mandate in favour of migrants, including the provision of an adequate level of core funding that allows IOM to take significant and forward-looking initiatives in terms of migration policies and practices, and to not be merely project-driven;

(g) Ensure, in all discussions relating to migration policies and practices, the participation of key United Nations agencies already working on migration issues, including OHCHR, ILO, UNHCR, UN-Women, UNODC, UNICEF and WHO, as well as United Nations human rights mechanisms, experts and civil society organizations;

(h) Ensure that States collect disaggregated data, on the basis of data gaps, in order to develop meaningful, evidence-based policies while ensuring data protection through the establishment of firewalls, and support the increased harmonization and coordination of migration data sources, collection and analysis in order to develop a systemic picture;

(i) Ensure a robust gender analysis of the difference in the impacts of policies on men and women, with special attention to the ways in which restrictions on women's mobility as a means of protection violate their rights and create favourable conditions for smuggling networks to thrive, including the use of a gender lens at all stages and in all aspects of the discussion as specific consideration of gender in the context of bilateral agreements, detention/deportation and readmission/repatriation is also crucial;

(j) Ensure that the detention of migrants is always a measure of last resort, permissible only when reasonable, necessary and proportionate, decided on a case-by-case basis, and enforced for the shortest possible period of time; develop rights-based alternatives to detention for most cases; and ensure that migrant children and families with children are never, ever, detained for reasons relating to their administrative immigration status.

United Nations A/71/286

General Assembly

Distr.: General
4 August 2016

Original: English

Seventy-first session
Item 69 (b) of the provisional agenda*
Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms

Promotion of a democratic and equitable international order

Note by the Secretary-General

The Secretary-General has the honour to transmit to the General Assembly the fifth report of the Independent Expert on the promotion of a democratic and equitable international order, Alfred-Maurice de Zayas, submitted in accordance with Assembly resolution 70/149.

* A/71/150.

16-13510 (E) 060916

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Report of the Independent Expert on the promotion of a democratic and equitable international order

Summary

The report focuses on impacts of taxation on human rights and explores the challenges posed to the international order by widespread tax avoidance, tax evasion, tax fraud and profit shifting, facilitated by bank secrecy and a web of shell companies registered in tax havens. The Independent Expert calls for resolute action by the international community, including through the creation of a United Nations tax cooperation body, the adoption of a United Nations tax convention, the phasing out of tax havens, the revision of the Guiding Principles on Business and Human Rights to include the obligation of corporations to pay their fair share of taxes and the adoption of a financial transactions tax.

I. Introduction

1. Since the early 1970s the General Assembly has adopted resolutions on a new international economic order.[1] After the turn of the millennium, the Assembly began to address the promotion of a democratic and equitable international order.[2] In its resolution 70/149, the Assembly affirmed that the responsibility for managing worldwide economic and social issues, as well as threats to international peace and security, must be shared among the nations of the world and should be exercised multilaterally, and that efforts to make globalization fully inclusive and equitable must include policies and measures at the global level that corresponded to the needs of developing countries and countries with economies in transition and were formulated and implemented with their effective participation. The Assembly underlined the importance of a global and inclusive post-2015 development agenda for the promotion of a democratic and equitable international order and of the establishment of a new international economic order based on equity, sovereign equality, interdependence, common interest and cooperation among all States, irrespective of their economic and social systems, which would correct inequalities and redress existing injustices and make it possible to eliminate the widening gap between the developed and the developing countries.

2. A peaceful and just world order has long been a concern of the international community, and in particular of the Commission on Human Rights,[3] the Subcommission on Promotion and Protection of Human Rights,[4] the Human Rights Council[5] and its special procedures and Advisory Committee,[6] the United Nations Conference on Trade and Development (UNCTAD),[7] as well as intergovernmental organizations including the Organization for Economic Co-operation and Development (OECD), all of which have provided invaluable reports. Alas, seldom do their recommendations result in thorough going reform of international financial rules or investment regimes. Cosmetic changes are not enough. What is needed is bold and concerted action by Governments, not more diagnoses.

3. Notwithstanding the hard-law quality of the international human rights treaty regime, there are no adequate enforcement mechanisms. The reality is that "the economy" seldom takes into account the needs of destitute people but reflects the interests of elites, who mostly oppose reforms. Pursuant to the Charter of the United Nations, the Organization has the mandate to change the rules so that human rights, including the right to development, take priority over economic mantras. At various United Nations summits, in the United Nations Millennium Declaration, in the Sustainable Development Goals, at the twenty-first session of the Conference of the

[1] Most notably resolution 3201 (S-6), containing the Declaration on the Establishment of a New International Economic Order, and resolution 3281 (XXIX) containing the Charter of Economic Rights and Duties of States.

[2] See, for example, resolutions 55/107, 56/151, 57/213, 61/160 and 63/189.

[3] See Commission resolutions 2004/64 and 2005/57.

[4] Report on the realization of economic, social and cultural rights by the Special Rapporteur, Danilo Türk (E/CN.4/Sub.2/1992/16).

[5] See, for example, resolution 28/5.

[6] Report on the issue of the negative impact of corruption on the enjoyment of human rights (A/HRC/23/9).

[7] Annual world investment reports and trade and development reports. See in particular http://unctad.org/en/PublicationChapters/tdr2014ch7_en.pdf; and http://unctad.org/en/PublicationChapters/wir2015ch5_en.pdf.

Parties to the United Nations Framework Convention on Climate Change, held in Paris in December 2015, and at the United Nations conferences on human settlements,[8] States rhetorically recognized the need to reorient the economy; but pledges and soft law rarely achieve results, and even legally binding treaties do not deliver unless there is transparency, accountability and enforcement. The announcement by the Group of Twenty (G-20) in 2009 that the "era of bank secrecy was over" has been followed by some good initiatives, notably the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes[9] and the development of the Standard for Automatic Exchange of Financial Account Information (the Common Reporting Standard); but these have only made a dent on tax havens.[10]

4. The current international economic order manifests growing inequalities among States and within States. Whereas the United Nations should determine the world agenda, the economic order is not set by the General Assembly but by major economic powers, by transnational corporations and by three international organizations — the World Trade Organization, the World Bank and the International Monetary Fund (IMF) — none of which have been incorporated into the United Nations system.[11] It is time to harmonize the policies of these three organizations with the purposes and principles of the Organization and to ensure that their actions do not frustrate the implementation of United Nations programmes.

5. There are systemic obstacles to changing this situation, among them asymmetrical power relationships; unfair taxation; lack of transparency and accountability; unjust enrichment; widespread corruption;[12] bribery; embezzlement; secrecy; collusion among lobbies, accounting and consulting firms and law firms; and vested interests of domestic and transnational corporations. These should be met by stricter implementation of domestic and international penal law.[13] This has a detrimental impact on human rights as it deprives States of resources needed to fulfil their human rights treaty obligations concerning the administration of justice, maintenance of infrastructures, health care, education and housing, and prevents them from implementing pledges for the Sustainable Development Goals and for environmental protection pursuant to the Paris Agreement.

6. The Independent Expert recognizes that a democratic and equitable international order cannot be achieved without adequate funding. A human rights-based approach to taxation and stricter measures against tax fraud, tax evasion and tax havens are urgently needed because a shortfall in tax revenues handicaps Governments in meeting human rights treaty obligations. Trillions of dollars are needed. As the Independent Expert outlined in his 2014 report to the Human Rights

[8] See http://unhabitat.org/un-habitat-presents-world-cities-report-to-european-audience/.

[9] See www.oecd.org/tax/forum-on-tax-administration/ftajitsicnetwork.htm; www.oecd.org/ctp/bribery-and-corruption-awareness-handbook-for-tax-examiners-and-tax-auditors-9789264205376-en.htm; www.oecd.org/ctp/crime/effective-inter-%20agency-cooperation-report.pdf; www.oecd.org/tax/crime/Oslo-Dialogue-flyer.pd; and http://www.ipsnews.net/2016/08/developing-nations-seek-tax-body-to-curb-illicit-financial-flows/.

[10] See www.theguardian.com/world/2009/apr/02/g20-summit-tax-havens.

[11] Pursuant to Articles 57 and 63 of the Charter. See A/HRC/33/40, para. 63.

[12] The United Nations Convention against Corruption states that "the illicit acquisition of personal wealth can be particularly damaging to democratic institutions".

[13] Ndiva Kofele-Kale, *The International Responsibility for Economic Crimes: Holding State Officials Individually Liable for Acts of Fraudulent Enrichment* (Routledge, 2006) and Sol Picciotto, *Regulating Global Capitalism* (Cambridge, 2011).

Council (A/HRC/27/51), one way of liberating funds is by drastically reducing military expenditures. Another way is by ensuring transparent and accountable fiscal and budgetary policies, so that individuals and corporations pay their fair share of taxes. Tax fraud should be systematically prosecuted and punished, and funds confiscated from organized crime activities, drug trafficking, illicit arms trade, trade in endangered species, etc. should be redirected to human rights programmes. Illicit deposits by kleptocrats must be returned to the countries of origin.[14] A further source of revenue would be through the imposition of a financial transactions tax, which would have the additional advantage of curbing speculation and reducing the volatility of financial markets.[15]

7. In a report submitted to the Human Rights Council at its twenty-sixth session, the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda, focused on fiscal and budgetary policy as a major component of human rights implementation, especially when tackling inequality and generating revenue for sustainable development, poverty reduction, education and job- and infrastructure-creation. Taxation must foster stronger governance, accountability and participation in public affairs. Principles of non-discrimination and equality and the duty of international cooperation and assistance should inform taxation policies at the global and national levels.[16]

8. At the twenty-eighth session of the Human Rights Council, the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of human rights, particularly economic, social and cultural rights, Juan Pablo Bohoslavsky, submitted an interim report on illicit financial flows and the post-2015 development agenda (A/HRC/28/60 and Corr.1). In his final report he observed, rather diplomatically:

> "Financial institutions that facilitate tax evasion and transnational corporations that employ aggressive tax planning strategies must recognize that their actions may have negative human rights impacts. They can demonstrate respect for human rights through appropriate policies and due diligence procedures, through country-by-country reporting, including publishing information about the taxes they pay to each country in which they operate. Similarly, the professionals that make up the tax planning industry, such as lawyers, accountants, bankers and wealth managers, must take responsibility for their contributions to the harms caused by tax abuse" (A/HRC/3161, para. 56).

9. The author of the present report would speak, more pointedly, of white-collar criminality that has enjoyed a high level of anonymity and impunity. Indeed, it is the infrastructure of intermediaries, including tax advisers, law firms, accountants and trust service providers, that facilitates tax evasion and avoidance as well as

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[14] See www.thedailybeast.com/articles/2016/05/03/how-the-kleptocrats-12-trillion-heist-helps-keep-most-of-the-world-impoverished.html. See also Human Rights Council resolution 31/22.

[15] See www.un.org/en/development/desa/news/policy/wess2012.html; and www.bbc.com/news/business-15552412.

[16] "Tax abuse includes tax evasion, fraud and other illegal practices, including the tax losses resulting from other illicit financial flows, such as bribery and money laundering ... . [G]lobally, approximately $3 trillion of government revenue is lost to tax evasion every year ... . In 2011, developing countries lost $946.7 billion owing to illicit financial flows, ... according to OECD more than seven times official development assistance for that year ... . Tax abuse is thus not a victimless practice; it limits resources that could be spent on reducing poverty and realizing human rights, and perpetuates vast income inequality" (A/HRC/26/28 and Corr.1, paras. 58-59).

cross-border illicit financial flows. Every strategy to tackle the intermediaries, euphemistically called "enablers" or "service providers", must be part of the effort to tackle tax evasion.

10. The present report is an interim report on the adverse impacts of unfair fiscal and budgetary policies on the international order, in which the Independent Expert gives due attention to the professional analysis of intergovernmental organizations such as the Geneva-based South Centre and OECD and its Tax Inspectors without Borders initiative,[17] as well as research conducted by civil society organizations including International Bar Association,[18] Global Policy Forum,[19] Global Justice Now,[20] Global Alliance for Tax Justice,[21] Oxfam,[22] Centre Europe-tiers monde,[23] Business and Human Rights Resource Centre,[24] Tax Justice Network,[25] Center for Economic Policy Research,[26] Centre for Economic and Social Rights,[27] Shift,[28] Citizens for Tax Justice,[29] Transparency International,[30] Independent Commission for the Reform of International Corporate Taxation,[31] Global Reporting Initiative,[32] Organized Crime and Corruption Reporting Project,[33] Friedrich Ebert Stiftung,[34] AllianceSud,[35] Comité catholique contre la faim et pour le développement-terre solidaire,[36] Secours Catholique-Caritas France,[37] Plateforme paradis fiscaux et judiciaires[38] and others. The Independent Expert adds his voice to those of the various groups and organizations which have undertaken initiatives in this area and calls on Governments to take urgent action to correct the glaring injustices perpetuated by the systematic avoidance of taxes through tax havens that siphon off trillions of dollars from the economies of many countries, including developing countries.

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[17] See www.oecd.org/tax/taxinspectors.htm.

[18] See www.ibanet.org/LPD/Taxation_Section/Taxes/Publications.aspx.

[19] See www.globalpolicy.org/home/272-general/52850-panama-papers-when-tax-abuse-is-human-rights-abuse.html.

[20] See www.imf.org/en/News/Articles/2015/09/28/04/53/sp011216.

[21] See www.globaltaxjustice.org/, http://www.globaltaxjustice.org/the-world-needs-a-un-global-tax-body-now/; and www.globaltaxjustice.org/wp-content/uploads/2015/02/UN-Tax-Body-Briefing-for-Government-Delegations-with-Logos.pdf.

[22] See www.oxfam.org/en/tags/tax-havens, https://www.oxfam.org.au/wp-content/uploads/2016/06/OXF003-Tax-Havens-Report-FA-WEB.pdf; and www.theguardian.com/world/2016/apr/14/us-corporations-14-trillion-hidden-tax-havens-oxfam.

[23] See www.cetim.ch/wp-content/uploads/Right-t http://cepr.org/o-development.pdf; and www.cetim.ch/wp-content/uploads/report_10.pdf.

[24] See https://business-humanrights.org/en/tax-avoidance-0.

[25] See www.taxjustice.net/topics/inequality-democracy/human-rights/.

[26] See http://cepr.org/, http://cepr.org/active/publications/discussion_papers/dp.php?dpno=8570.

[27] See www.cesr.org/section.php?id=229, http://cesr.org/downloads/Tax_Evasion_ETOs_2014.pdf.

[28] See www.shiftproject.org/article/tax-abuse-business-and-human-rights-issue.

[29] See http://ctj.org/ctjreports/2015/10/offshore_shell_games_2015.php#.V4OtIfl97IU.

[30] See www.transparency.org/glossary/term/tax_haven.

[31] See www.icrict.org/declaration/.

[32] See www.globalreporting.org/Pages/default.aspx.

[33] See www.occrp.org/en/daily/5133-unaoil-leaks-investigation-spotlights-global-oil-industry-bribes-for-contracts-scandal.

[34] See library.fes.de/pdf-files/iez/global/04669.pdf.

[35] See www.alliancesud.ch/en/publications/downloads/5769_alliancesud_news_nr%2079_GzD.pdf.

[36] See http://ccfd-terresolidaire.org/infos/partage-des-richesses/paradisfiscaux/.

[37] See www.secours-catholique.org/actualites/sur-la-piste-des-banques-francaises-dans-les-paradis-fiscaux.

[38] See www.stopparadisfiscaux.fr/.

11. In May 2016 more than 300 leading economists and lawyers appealed to Governments to work for fiscal transparency. Olivier Blanchard, Angus Deaton, Nora Lustig and Thomas Piketty expressed the view that tax havens served no economic purpose, and that they should end. In particular, they called on Governments to adopt global rules requiring companies to publicly report taxable activities in every country in which they operated and to ensure that all territories publicly disclosed information about the real owners of companies and trusts. "As the Panama Papers and other recent exposés have revealed, the secrecy provided by tax havens fuels corruption and undermines countries' ability to collect their fair share of taxes."[39]

12. The Special Adviser to the Secretary-General on the 2030 Agenda for Sustainable Development, Jeffrey Sachs, stated: "Tax havens do not just happen. The British Virgin Islands did not become a tax and secrecy haven through its own efforts. These havens are the deliberate choice of major governments, especially the United Kingdom and the United States, in partnership with major financial, accounting, and legal institutions that move the money".[40]

13. Part of the problem lies in the mantras of market fundamentalism and the belief that financial markets should be deregulated because this ultimately benefits everyone, including the poor. Although no empirical evidence exists to back this up, transnational corporations and the super-rich have succeeded in creating an enabling environment for systematic looting of society. Collusion between the world's biggest banks, specialized law firms, and consulting and accounting firms has led to a global system designed to hide money and avoid taxes by virtue of secretive offshore structures. This is unethical and should be perceived as such by professional associations, law schools and business schools. Yet, instead of prohibiting activities that are clearly *contra bonos mores*[41] and may amount to conspiracy, or even a form of racketeering, States have entered into a kind of self-destructive competition among themselves to see which jurisdiction offers greater

[39] See www.oxfam.org/en/pressroom/pressreleases/2016-05-09/tax-havens-serve-no-useful-economic-purpose-300-economists-tell. See also https://panamapapers.icij.org/. In defence of tax havens, see www.internationalman.com/articles/the-moral-case-for-tax-havens.

[40] See www.theguardian.com/world/2016/may/09/tax-havens-have-no-economic-justification-say-top-economists.

[41] Alfred Verdross, "Forbidden treaties in international law", *American Journal of International Law*, vol. 31, No. 4 (Oct. 1937), pp. 571 ff; A. Verdross, "Les principes généraux du droit et la jurisprudence internationale", *Collected Courses of the Hague Academy of International Law*, vol. 52 (1935), pp. 195-249; Olivier Corten and Pierre Klein, eds., *The Vienna Convention on the Law of Treaties: A Commentary*, Volume I (Oxford University Press, 2011), p. 146; and Robert Kolb, *The International Court of Justice* (Oxford University Press, 2013), p. 81. There is an ethical minimum standard for treaties, and a treaty which subverts *ordre public* or is otherwise *contra bonos mores* is void, e.g., if it prevents the universally recognized tasks of a civilized State such as maintenance of public order, care of the bodily and spiritual welfare of citizens and protection of nationals abroad. Bruno Simma, "The contribution of Alfred Verdross to the theory of international law", *European Journal of International Law*, vol. 6 (1995), pp. 33-54; and Gleider Hernandez, "A reluctant guardian: the International Court of Justice and the concept of 'international community'", *British Yearbook of International Law*, vol. 83, No. 1 (2012). See also Sir Hersch Lauterpact on "overriding principles of international law" in *Yearbook of the International Law Commission 1953*, vol. II (United Nations publication, Sales No. 59.V.4, Vol. II), p. 155; Alexander Orakhelashvili, ed., *Research Handbook on the Theory and History of International Law* (Elgar, 2011); and https://law.wustl.edu/SBA/upperlevel/International%20Law/IntLaw-Mutharika2.pdf.

secrecy facilities. The situation has been a bonanza for lawyers and accounting firms and become toxic to the fiscal health of many countries, particularly since financial globalization expanded in the 1980s and 1990s. The offshore world corrupts and distorts markets and investments, shaping them in ways that have nothing to do with efficiency.[42]

14. Whistle-blowing is one of the most effective methods of shining a light on corruption. Thanks to the revelations of whistle-blowers a public debate on tax havens has started that is providing momentum for legislative changes to abolish secrecy jurisdictions. But whistle-blowers often pay a heavy price. It is in the spirit of a democratic and equitable international order to adopt legislation to protect whistle-blowers and witnesses from reprisals and to provide them with easy-to-access avenues to make disclosures. Transparency International has published a report on whistle-blower protection laws,[43] and a recent study by several institutions entitled "Whistleblower protection laws in G20 countries: priorities for action" analyses the state of whistle-blower protection rules and finds important shortcomings, especially concerning the absence of anonymous channels for employees to discreetly report sensitive information.[44] Luxembourg Leaks ("LuxLeaks"), "SwissLeaks" and the Panama papers lay bare the way that financial secrecy facilitates corruption when individuals and corporations can hide behind layers of anonymous companies, trusts and foundations.

15. In the period following his 2015 report to the General Assembly, the Independent Expert sent communications to States and questionnaires to Governments and intergovernmental organizations, and participated in international conferences, academic symposia and United Nations side events as outlined in his report to the Human Rights Council (A/HRC/33/40).

II. Facts and implications

16. OECD had defined a tax haven as "a country which imposes a low or no tax, and is used by corporations to avoid tax which otherwise would be payable in a high-tax country. ... [T]ax havens have the following key characteristics: No or only nominal taxes; Lack of effective exchange of information; Lack of transparency in the operation of the legislative, legal or administrative provisions."[45] OECD subsequently set up the Global Forum on Transparency and Exchange of Information for Tax Purposes and implemented a rigorous peer review process with ratings to determine compliance with international standards in tax transparency.[46]

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[42] See http://hack.tion.free.fr/mvtsoc/Attac/www.attac.org/fra/toil/doc/oxfam2.htm.

[43] See www.transparency.org/topic/detail/whistleblowing/.

[44] See www.transparency.de/fileadmin/pdfs/Themen/Hinweisgebersysteme/Whistleblower-Protection-Laws-in-G20-Countries-Priorities-for-Action.pdf.

[45] See www.oecd.org/ctp/glossaryoftaxterms.htm. See also www.taxjustice.net/cms/upload/pdf/oxfam_paper_-_final_version__06_00.pdf.

[46] For lists of secrecy jurisdictions, including a list of "uncooperative tax havens", see www.oecd.org/countries/monaco/listofuncooperativetaxhavens.htm. For other lists, see www.imf.org/external/NP/ofca/OFCA.aspx; www.bis.org/statistics/dsd_cbs.pdf; and www.gao.gov/assets/290/284522.pdf.

17. The Whistleblower Justice Network suggests the following definition: "a country (or territory) whose laws make the country attractive as a tax shelter for foreign money".[47]

18. According to Tax Justice Network, there are over 100 "secrecy jurisdictions", a term preferred over tax havens for which there is no definition based on objectively verifiable criteria. The Network's global analysis reveals that there is a spectrum of financial secrecy in most jurisdictions assessed and that what is needed is a reform of the system, rather than looking for "unproblematic" jurisdictions.

19. Also according to Tax Justice Network, an estimated $21-$32 trillion of private financial wealth is located offshore, untaxed or lightly taxed, in secrecy jurisdictions around the world. Estimated revenue losses are on the order of $190 billion annually.[48] According to UNCTAD, this costs developing countries more than $100 billion annually.[49]

20. The Tax Justice Network Financial Secrecy Index ranks jurisdictions according to their secrecy and the scale of their offshore financial activities (see annex). The top three jurisdictions listed in the 2015 index were Switzerland, Hong Kong, China,[50] and the United States.[51] Other high-profile jurisdictions include the United Kingdom of Great Britain and Northern Ireland and its Overseas Territories and Crown Dependencies, Luxembourg, the Netherlands, Belgium, Malta,[52] Cyprus, Singapore, Liberia[53] and Panama.

21. According to Tax Justice Network, illicit cross-border financial flows have been estimated at $1.6 trillion per year, dwarfing the $135 billion devoted globally to "foreign aid". It is estimated that since the 1970s African countries alone have lost over $1 trillion in capital flight, while combined external debts are less than $200 billion. Viewed from this perspective, Africa is a major creditor to the world, but its assets are in the hands of a wealthy elite, protected by offshore secrecy, while the debts are shouldered by populations already suffering from extreme poverty. European countries such as Greece, Italy and Portugal have also endured decades of tax evasion via offshore secrecy.

22. According to University of California, Berkeley economist Gabriel Zucman, tax evasion costs Governments approximately $200 billion annually.[54]

23. According to OECD, the artificial schemes of base erosion and profit shifting (BEPS) result in global corporate income tax revenue losses of $100-$240 billion annually.[55]

[47] See https://whistleblowerjustice.net/what-is-a-tax-haven/

[48] See www.taxjustice.net/cms/upload/pdf/Price_of_Offshore_Revisited_120722.pdf.

[49] See www.taxjustice.net/2015/03/26/unctad-multinational-tax-avoidance-costs-developing-countries-100-billion/.

[50] See www.scmp.com/business/markets/article/1880426/crackdown-caribbean-tax-havens-surprise-boon-hong-kong.

[51] See www.bloomberg.com/news/articles/2016-01-27/the-world-s-favorite-new-tax-haven-is-the-united-states.

[52] See www.independent.com.mt/articles/2016-06-12/local-news/Malta-is-the-EU-s-number-four-corporate-tax-haven-Oxfam-International-6736159237; and www.oxfam.org/en/pressroom/pressreleases/2013-05-22/tax-private-billions-now-stashed-away-havens-enough-end-extreme.

[53] See www.financeuncovered.org/investigations/liberia-americas-outpost-financial-secrecy/.

[54] *The Hidden Wealth of Nations, the Scourge of Tax Havens* (University of Chicago, 2015).

[55] See www.theguardian.com/global-development-professionals-network/2016/may/10/were-losing-240bn-a-year-to-tax-avoidance-who-really-ends-up-paying.

24. According to Oxfam, United States corporations hide at least $1.3 trillion in tax havens.[56] Profit shifting by United States multinationals suggests that about 25-30 per cent of global profits are shifted into jurisdictions with no corresponding real economic activity.

25. Tax havens host a substantial portion of the world's foreign direct investment.[57]

26. Fifty-one of the 68 companies that borrowed money from the World Bank's private lending arm in 2015 to finance investments in sub-Saharan Africa use tax havens.[58]

III. Obstacles and bad practices

27. Euphemisms constitute an obstacle to reform, because subconsciously, many politicians, legislators, business people, investors, transnational corporations, journalists and even the public do not "feel" that business activity and trade can be toxic for the human rights of billions of human beings. They perceive business as always beneficial, and tax manipulators are euphemistically referred to as "legal providers". Many do not immediately see "tax havens" or "shelters" as corruption ports, and endorse dubious forms of "tax optimization" as perfectly "legal", although some forms are borderline activities that would otherwise constitute tax fraud, racketeering or conspiracy. How else can one characterize the collusion of business lobbies, politicians, tax lawyers, banks and accounting and consulting firms in the creation of a thoroughly artificial system with special tax laws, "incentives" and loopholes that serve no economic or job-creating purpose, but allow companies to cheat Governments of tax revenue? The Guiding Principles on Business and Human Rights do not contain any provision concerning the obligation of businesses to pay their fair share of taxes. There is no mention of tax evasion, tax fraud or tax havens. Nor is there even in the commentary of the International Bar Association,[59] as if businesses were exempt from human rights obligations in the field of taxation. Perhaps this obligation could be interpreted in the Guiding Principles under the rubric "due diligence", but it should have merited at least one separate article.

28. Exploitation of loopholes directed by an organized tax avoidance industry dominated by four accounting firms (Deloitte, PricewaterhouseCoopers, KPMG and Ernst and Young), and avidly copied by others, is having a disastrous impact on human rights. As reports have documented, "they are setting the standards to suit themselves ... working in collusion with company executives to boost their rewards by hyping shareholder value at the expense of investment, social interests and long-

[56] See www.theguardian.com/world/2016/apr/14/us-corporations-14-trillion-hidden-tax-havens-oxfam; www.oxfamamerica.org/static/media/files/Broken_at_the_Top_4.14.2016.pdf; and www.taxjustice.net/cms/upload/pdf/oxfam_paper_-_final_version__06_00.pdf. Reportedly, Apple has $181 billion offshore, General Electric $119 billion and Microsoft $108 billion.

[57] See https://tax.network/ddharmapala/what-problems-and-opportunities-are-created-by-tax-havens/.

[58] See www.oxfam.org/en/pressroom/pressreleases/2016-04-11/majority-world-banks-private-investments-go-companies-have.

[59] See https://business-humanrights.org/sites/default/files/documents/IBA_Practical_Guide.pdf; and www.ibanet.org/Article/Detail.aspx?ArticleUid=c9bd50c6-c2b3-455b-b086-a7efbfe1f6a5.

term survival". Not only does this behaviour illustrate an unsophisticated and selfish approach to business driven by short-term profit only, but, most importantly, it severely undermines democracy and the welfare of the people. Depriving them of essential resources for health care, education, security and other basic needs, it has led numerous Governments "to shift taxes away from giant corporations and wealthy elites to labour, consumption and savings, depressing ordinary people's purchasing power and causing economic crises".[60]

29. Another obstacle is a sense of false security that "someone is working to solve the problems", emanating from the fact that organizations like OECD exist. At a meeting in New York in April 2016, a representative of Financing for Development Group, stated: "Rich countries [get] together in a closed room and decide on what they call global tax rules."[61] She noted that the current OECD-coordinated process is "extremely undemocratic" and that the rules disadvantage developing countries. For example, according to OECD rules, when a company operates in more than one country, taxes should generally be paid in the country where the company has its headquarters. This favours OECD member countries, where headquarters are often located, and disadvantages developing countries, where companies perform substantial parts of their operations. To counter this situation, the Group of 77 (G-77) and China, representing 134 Member States, has urged the United Nations to take a greater role in global tax cooperation, arguing that that this would strengthen international cooperation in this field and allow countries, including developing countries, to have an equal say on issues related to tax matters. Unfortunately, this proposal was rejected in the Addis Ababa Action Agenda of the Third International Conference on Financing for Development, which confirmed OECD control over global tax matters. Observers feel that the exclusion of more than 100 developing countries from the opaque rule-making processes is a reason why the global tax system has become so "fragmented, dysfunctional and unfit to meet the needs of the developing world".[62] The recently launched BEPS framework aims at addressing this point.

30. Meanwhile intra-company royalty payments are becoming a preferred vehicle for aggressive tax avoidance. Legislation should be adopted to prohibit this kind of artificial intra-company arrangement, which serves no purpose other than to deprive the State of legitimate tax revenue.[63] The World Economic Forum would be a good place to discuss these issues, but it may be that some of the big players still cherish fiscal paradises and will delay doing away with them.[64]

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[60] Austin Mitchell and Prem Sikka, *The Pin-Stripe Mafia: How Accountancy Firms Destroy Societies* (Association for Accountancy and Business Affairs, 2011). Auditing firms advise transnational corporation and super-rich individuals how to structure their accounts in order to minimize tax and lobby Governments and supranational organizations to keep loopholes open for transnationals and to block transparency, devise new tax avoidance scams, advise Governments on new tax rules to ensure that the privileges of transnationals are preserved or expanded, undemocratically influence the development of tax law, engage in revolving door practices, act as a quasi-legitimate face for tax havens and fund think tanks to frame tax debates in a race to the bottom. See also Jim Cousins, Austin Mitchell and Prem Sikka, *Race to the Bottom: The Case of the Accountancy Firms* (Association for Accountancy and Business Affairs, 2004).

[61] See www.ipsnews.net/2016/04/developing-countries-left-out-of-global-tax-decisions/.

[62] See www.globaltaxjustice.org/the-world-needs-a-un-global-tax-body-now/.

[63] See www.alliancesud.ch/en/publications/downloads/5769_alliancesud_news_nr%2079_GzD.pdf.

[64] See www.ipsnews.net/2005/01/world-economic-forum-corporations-in-search-of-paradise-fiscal-that-is/.

A. Panama papers

31. In April 2016, the International Consortium of Investigative Journalists (ICIJ)[65] released the Panama papers, nearly 12 million leaked documents that detail financial information on shell companies and tax havens by a single law firm in Panama, revealing the tip of an iceberg of tax avoidance, tax evasion and kleptocracy. One may ask how many other law firms in how many other secrecy jurisdictions are doing the same thing. The publication by ICIJ in May 2016 of a searchable database of over 214,488 offshore entities created in 21 jurisdictions, stretching from Nevada to Hong Kong, China to the British Virgin Islands,[66] may provide answers.

32. There has been a convergence of powerful interests working hand in hand to take advantage of any loophole in tax laws and to create dubious entities and shell companies that serve no economic or entrepreneurial purpose; their principal purpose is to hide great fortunes, including those of developing world kleptocrats who have looted their countries.[67] In some cases these entities have served to launder money that has been generated through questionable activities. These practices have contributed to the worsening of economic inequality. The Panama papers are not about Panama, or about the law firm Mossack Fonseca,[68] but about the worldwide network of secrecy jurisdictions.

33. In an answer to the questionnaire on the impact of tax evasion and tax havens on human rights sent by the Independent Expert,[69] OECD stated the following:

> While it's easy to focus on the bad news from the Panama Papers and other leaks, it is important to recognize the good news as well. It is clear from the information that has become available that the steps that the global community has been taking to address transparency of ownership information are starting to work. The figures presented by the ICIJ, for example, show that the number of bearer share companies formed by Mossack and Fonseca has been in decline for some time and had fallen to almost zero in 2015. All of the jurisdictions which were used to create these companies have now either immobilized bearer shares, including Panama itself, which immobilized them in 2015, or, as in the case of Seychelles, eliminated bearer shares entirely. What all this shows is that we are on the right track and that financial centres around the world are responding to the new environment with continued improvements in the area of tax transparency. What remains to be done is to ensure the implementation of the global tax transparency and exchange of information standards in full.

34. Thus far, the consequences of the Panama papers scandal have been remarkably mitigated. Only one Head of Government resigned, the President of Iceland.[70] It appears, as in other situations involving white-collar abuses, that

[65] See https://panamapapers.icij.org/; and www.cesr.org/article.php?id=1834 Center for Economic and Social Rights, when Tax abuse is Human Rights Abuse.

[66] See https://panamapapers.icij.org/blog/20160509-offshore-database-release.html; https://offshoreleaks.icij.org/nodes/61034; and https://www.icij.org/offshore#_ga=1.183963814.1052794772.1467974903.

[67] See the series of articles by ICIJ on secret deals in Africa, available from https://panamapapers.icij.org/.

[68] On 16 June 2016, The *New York Times* reported that a Mossack employee had been arrested in Geneva as a suspected whistle-blower. See www.counterpunch.org/2016/04/18/panama-and-the-criminalization-of-the-global-finance-system/.

[69] Available from www.ohchr.org/EN/Issues/IntOrder/Pages/IEInternationalorderIndex.aspx.

[70] See www.theguardian.com/world/2016/apr/05/iceland-prime-minister-resigns-over-panama-papers-revelations.

impunity continues. The Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, observed at the end of an official visit to the United States in July 2016 that Wall Street bankers had looted billions of dollars through crooked schemes, devastating the finances of millions of Americans and saddling taxpayers with a massive bailout bill. He noted that as yet, he had not heard any suggestions for a "war on Wall Street theft" (similar to the "war on drugs").[71]

B. Tax havens and corruption

35. In March 2016, the Huffington Post published the results of a months-long investigation into Unaoil, a Monaco-based firm registered in a tax haven, the British Virgin Islands. Unaoil and its subcontractors are reported to have bribed foreign officials to help major multinational corporations win contracts, as tens of thousands of the company's internal documents allegedly show. "The investigation illustrates just how complicit big Western companies are in corruption overseas. It also shows that by enabling corruption, these companies fuel the kind of political instability that allows insurgencies like the self-described Islamic State to grow."[72]

36. The Unaoil bribery scandal reveals systematic bribery by numerous transnational enterprises. Besides issues of corruption, this raises issues of tax evasion, since bribes were presumably not reported or taxed. Where are these moneys harboured? According to the leaked information, government contracts worth billions of dollars were allegedly awarded to the British enterprise Rolls-Royce, the United States multinational Halliburton, the Australian company Leighton Holdings and Republic of Korea corporations Samsung and Hyundai, thanks to bribes paid on behalf of the firms. The Federal Bureau of Investigation, the United States Department of Justice and anticorruption authorities in Australia and the United Kingdom have launched a joint investigation into the "bribes-for-contracts" scandal.

C. The art of creating "unreality": innovative schemes by major accounting firms

37. In November 2014 ICIJ obtained from a source thousands of leaked documents revealing an intricate web of tax avoidance based in Luxembourg.

38. Global auditing firms are the architects of offshore banking. The ICIJ website offers the following account: For more than a decade, PricewaterhouseCoopers helped Caterpillar move profits produced in the United States to a tiny subsidiary in Switzerland. Although parts were shipped from suppliers to the United States and then shipped from the warehouse to independent dealers, the profits were booked by the Swiss subsidiary, which paid corporate taxes of less than 6 per cent a year, far lower than Caterpillar's 29 percent rate in the United States. By 2008, partners at the accounting firm worried that the strategy might be threatened by Caterpillar's decision to move some managers to the United States, a shift that would underline the parts business' small footprint in Switzerland. A PricewaterhouseCoopers

[71] See www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20317&LangID=E.

[72] See www.huffingtonpost.com/entry/unaoil-scandal-explained_us_56fbd2f0e4b0daf53aec0cff; and www.theguardian.com/business/2016/jul/19/serious-office-opens-criminal-investigation-into-unaoil.

partner who had helped design the tax-savings plan wrote to a colleague that they needed to "create a story" that "put some distance" between the managers and the spare-parts business. The colleague noted that, in any case, both would be retired before the strategy came up for audit. At a hearing before the United States Congress in 2015, Senator Carl Levin criticized the profit-shifting strategy as an exercise in the art of "creating unreality". An investigation revealed that the accounting firm had exploited legal loopholes to help Caterpillar shift $8 billion in paper profits from the United States to Switzerland, reducing the equipment maker's United States tax bill by $2.4 billion.[73]

39. ICIJ goes on to explain how internal company documents in Luxembourg revealed that PwC helped PepsiCo, Ikea and other corporate giants implement abstruse profit-shifting strategies allowing them to slash their tax bills by billions of dollars. Meanwhile, in the United States, authorities were investigating another major accounting firm, KPMG, for promoting offshore tax shelters that created billions of dollars in fake losses and allegedly misled the Internal Revenue Service about the shelters. In New York, another accounting firm, Deloitte, was being investigated for helping a British bank violate sanctions against the Islamic Republic of Iran, submitting a "watered-down" report to regulators.

40. In Dubai, Ernst and Young allegedly helped the largest gold refiner in the Middle East with obscure practices that may violate international standards aimed at combating trafficking in "conflict gold" from regions where competition for the mineral has led to bloodshed.

41. Although KPMG and PwC contend that they have strict codes of conduct for everyone working under their banners worldwide,[74] there seems still to be a very long way to go for accounting firms to understand what ethics, accountability and social justice mean.

42. The issue arises whether Governments see the major accounting firms as they viewed the big banks, "too big to fail". This attitude discourages reform, because partners know that Governments will only go so far in punishing bad behaviour. Most worrisome are revolving door practices and the infiltration of Government by the major auditing firms, which have gained influence and inside knowledge by helping Governments write the laws that establish the offshore system's rules of engagement, and by lobbying heavily to keep the rules to their liking. Austin Mitchell, a former Member of Parliament in the United Kingdom, has gone so far as to call the auditing firms "more powerful than government".[75] Critics contend that executives of the major accounting firms shuttle between the accounting industry and government so often in Europe and other regions that it undermines authorities' efforts to police the industry and enforce tax laws.

[73] See www.icij.org/project/luxembourg-leaks/big-4-audit-firms-play-big-role-offshore-murk.

[74] Ibid.

[75] See www.theaccountant-online.com/features/political-donations-are-a-way-of-influencing-policy-and-buying-influence-austin-mitchell-former-mp-4583932/.

D. LuxLeaks and the protection of whistle-blowers

43. The Luxembourg Leaks investigation is based on a confidential cache of secret tax agreements approved by Luxembourg authorities that provide "tax relief" for more than 350 companies around the world. Although against national and international *ordre public*, the private deals are technically legal in Luxembourg.[76] The fact that the then President of Luxembourg became President of the European Commission in 2014 raises questions as to his commitment to end tax avoidance.[77] Unfortunately, the European Parliament failed to establish a committee of inquiry into the LuxLeaks scandal, as demanded by numerous parliamentarians.[78]

44. The whistle-blowers who revealed the tax abuse were tried in the first half of 2016.[79] On 29 June, two former PricewaterhouseCoopers employees received suspended sentences of 12 and 9 months[80] respectively for leaking documents revealing how Luxembourg granted lucrative tax breaks that saved firms including Apple, Ikea and PepsiCo billions of dollars in taxes.[81] We seem to live in an upside-down world, in which whistle-blowers are convicted and those who loot society are not. Whistle-blowers are heroes of our time, serving society and human rights. It is urgent for parliaments to adopt robust legislation not only to protect whistle-blowers, but also to reward them for contributing to ethics and integrity, especially in a sector where professional secrecy is at a peak.[82]

45. Instead of thoroughly investigating and, where necessary, taking penal measures against those involved in the LuxLeaks scandal, in May 2016 the European Union approved the Directive on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure,[83] which civil society fears may enable lawsuits against journalists, trade unionists or whistle-blowers who publish internal information from a company.[84]

46. Other whistle-blowers involved in litigation are:

- Daniel Schlicksup, whose whistle-blower retaliation suit against Caterpillar in 2012 led to the hearing of the United States Senate Permanent Subcommittee on Investigations on "Caterpillar's Offshore Tax Strategy".
- Bradley Charles Birkenfeld, whose disclosures led to a massive fraud investigation against the Swiss bank UBS and other banks by the United States Government; Mr. Birkenfeld was sentenced to prison in 2009.

[76] See www.icij.org/project/luxembourg-leaks/explore-documents-luxembourg-leaks-database.
[77] See www.theguardian.com/world/2014/dec/14/jean-claude-juncker-luxembourg-tax-deals-controversy.
[78] See www.euractiv.com/section/euro-finance/news/parliament-despondent-after-failure-of-luxleaks-committee/.
[79] See www.transparency.org/news/feature/whats_it_like_to_be_a_whistleblower.
[80] See www.bbc.com/news/world-europe-36662636.
[81] See criticism of the decision by civil society at www.transparency.org/news/pressrelease/transparency_international_condemns_prosecution_and_sentencing_of_luxleaks.
[82] See www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20212&LangID=E#sthash.vCPeNjq5.dpuf.
[83] See http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:PE_76_2015_INIT&from=EN.
[84] See http://corporateeurope.org/power-lobbies/2016/05/trade-secrets-protection-directive-still-dangerous-freedoms-and-rights.

- Swiss auditor Rudolf Elmer, who has been pursued by Swiss courts, allegedly for breaking Swiss banking secrecy while he was working in the Cayman Islands.
- Stéphanie Gibaud, who worked for UBS in Paris, was harassed and eventually fired after she made allegations about the company. In March 2015 a French labour tribunal ruled that she had been bullied by the bank.
- Rafi Rotem, who exposed a serious case of corruption in the Israeli Tax Authority and was fired.

E. Tax competition and "incentives"

47. Competition among States to see which will tax less can only lead to further impoverishment of States and aggravation of domestic and international inequality.[85] In her report on taxation and human rights (A/HRC/26/28 and Corr.1), the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda, deplored the difficulties in reaching an international agreement on tax cooperation, observing that low-income States and States with high debt levels or loans from international financial institutions had lost sovereignty over their tax policy and that their actions were frequently constrained by powerful countries, international financial institutions and business interests. She noted that tax sovereignty was also undermined by competition for foreign investment between developing countries, creating a "race to the bottom" in terms of both corporate tax rates and incentives, and that many States granted tax incentives to corporations as they competed to attract foreign investment, in particular in the agriculture and mining sectors. She concluded that such incentives warranted a heightened level of scrutiny in human rights terms because they restricted the State's revenue and therefore the resources it was able to devote to the realization of human rights. Losses to developing countries could reach $138 billion per year. The author of the present report concurs, and asserts that such harmful competition must be banned.

48. In 1997 the European Union Economic and Financial Affairs Council (Ecofin) adopted a non-binding Code of Conduct on business taxation,[86] under which States undertake to avoid harmful tax practices. The criteria for what constitutes "potentially harmful tax measures" include tax benefits reserved for non-residents and lack of transparency. However, the Code of Conduct Group refrained from discouraging the use of "sweetheart" deals, and latest data suggest that the use of such arrangements has been increasing. Meanwhile, article 87 of the Treaty establishing the European Community prohibits State aid that threatens to distort the European single market. The application of article 87 was laid out in the "Commission notice on the application of the State aid rules to measures relating to direct business taxation" (1998), according to which actions taken by the member State may be considered State aid if they are specific or selective, rather than general in nature. Moreover, the measure is not required to be a direct subsidy. Paragraph 22 of the notice stipulates: "Every decision of the administration that

[85] OECD, *Harmful Tax Competition: An Emerging Global Issue* (Paris, 1998), pp. 13-14; and Africa Progress Panel, *Equity in Extractives: Stewarding Africa's Natural Resources for All: Africa Progress Report 2013*, p. 65.

[86] See http://ec.europa.eu/taxation_customs/taxation/company_tax/harmful_tax_practices/index_en.htm.

departs from the general tax rules to the benefit of individual undertakings in principle leads to a presumption of State aid and must be analysed in detail." Accordingly, the European Commission has opened investigations into alleged "sweetheart" deals for multinational companies including Apple[87] in Ireland, Starbucks[88] in the Netherlands, Fiat,[89] Amazon.com[90] and McDonald's[91] in Luxembourg.

49. On 11 January 2016, the Commission found that selective tax advantages granted by Belgium under its "excess profit" tax scheme violated European Union State aid rules. The scheme, benefiting at least 35 multinationals, must end and the multinationals must now return unpaid taxes to Belgium. The "excess profit" tax scheme, applicable since 2005, allowed certain multinational group companies to pay substantially less tax in Belgium on the basis of tax rulings which reduced the corporate tax base of the companies by 50-90 per cent, to discount for so-called "excess profits" allegedly resulting from being part of a multinational group. The Commission's in-depth investigation, opened in February 2015, concluded that the scheme had derogated from normal practice under Belgian company tax rules and the so-called "arm's length principle".[92]

50. The above illustrates the widespread nature of the abuse and the necessity of insisting on public country-by-country reporting to display the massive misalignment between business activities elsewhere and profits declared in Belgium, Ireland, Luxembourg, the Netherlands and other countries at advantageous tax rates. The European Parliament has called for the key elements of "sweetheart" deals to be made public, but this proposal has not been endorsed by the European Commission nor by the Council of the European Union.

F. Organization for Economic Co-operation and Development and Directive of the Council of the European Union

51. On 21 June 2016, the Council of the European Union agreed on a draft directive addressing tax avoidance practices commonly used by large companies. The directive is part of a January 2016 package of Commission proposals and builds on 2015 OECD recommendations to address BEPS.[93] The directive has been heavily criticized by civil society: Oxfam has said that Governments have been unable to agree on an effective approach against parking profits in tax havens at a time when repeated tax scandals are calling for immediate and efficient action; what is needed to end tax dodging are rules that require big companies to disclose where they make their profits and where they pay their taxes.[94] In 2015, the Independent Commission

[87] See www.theguardian.com/technology/2016/jan/15/apple-european-commission-ruling-back-taxes-ireland.

[88] See www.theguardian.com/business/2015/oct/21/starbucks-and-fiat-tax-deals-with-eu-nations-ruled-unlawful.

[89] See http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38375.

[90] See http://europa.eu/rapid/press-release_IP-14-1105_en.htm.

[91] See http://europa.eu/rapid/press-release_IP-15-6221_en.htm.

[92] See http://europa.eu/rapid/press-release_IP-16-42_en.htm.

[93] See http://www.consilium.europa.eu/en/press/press-releases/2016/06/21-corporate-tax-avoidance/.

[94] See www.oxfam.org/en/pressroom/reactions/eu-finance-ministers-unwilling-address-tax-avoidance.

for the Reform of International Corporate Taxation issued a declaration in which it expressed reservations concerning the "targeted reforms" of the BEPS system.[95]

G. United Nations Conference on Trade and Development

52. The fourteenth session of the United Nations Conference on Trade and Development (UNCTAD XIV) took place in July 2016. In spite of constructive proposals made by many delegations, the outcome documents failed to give UNCTAD a clear mandate to expand its work on the impacts of taxation and tax avoidance on development. In order to facilitate the achievement of the Sustainable Development Goals and promote a democratic and equitable international order, the mandate of UNCTAD requires strengthening with respect to specific competences concerning international cooperation on taxation, abolishing tax havens, controlling financial flows and providing technical assistance, while ensuring that all States participate on an equal footing in international tax forums. Unfortunately, developed countries blocked relevant proposals.

IV. Good initiatives and practices

53. The Convention on Mutual Administrative Assistance in Tax Matters, the most comprehensive multilateral instrument for tax cooperation, was elaborated by OECD and the Council of Europe in 1988 and amended by Protocol in 2010. The G-20 has consistently encouraged countries to sign the Convention, including most recently at the meeting of the G-20 finance ministers and central bank governors in February 2016.[96] Ninety-eight jurisdictions currently participate in the Convention, representing a wide range of countries including all G-20 countries, the BRICS countries (Brazil, the Russian Federation, India, China and South Africa), all OECD countries, major financial centres and an increasing number of developing countries.

A. A United Nations tax cooperation body

54. Within the United Nations, since 2012 the G-77 and China have proposed that the Committee of Experts on International Cooperation in Tax Matters be transformed into a global, inclusive norm-setting body for international tax cooperation at the intergovernmental level. This idea has been gaining momentum with numerous non-governmental organizations,[97] including Global Alliance for Tax Justice. In preparation for the Third United Nations Conference on Financing for Development, held in Addis Ababa in September 2015, Global Alliance submitted a position paper calling for a global tax body.[98] Following up on the conference, Global Alliance again called for the creation of a global tax body as the most

[95] See www.icrict.org/wp-content/uploads/2015/06/ICRICT_Com-Rec-Report_ENG_v1.4.pdf.

[96] See www.oecd.org/tax/exchange-of-tax-information/conventiononmutualadministrativeassistanceintaxmatters.htm.

[97] See https://business-humanrights.org/en/ngos-call-for-greater-representation-of-developing-countries-in-global-tax-talks-emphasise-need-for-un-global-tax-body.

[98] See www.globaltaxjustice.org/sites/default/files/FINAL_GATJ_FFD_position-paper_20March2015.pdf.

effective way to achieve an equitable global tax system, increase domestic resource mobilization and reduce intra-State and inter-State inequality.[99]

55. On 9 June 2016, the President of Ecuador, Rafael Correa, endorsed the proposal to create a world institution to eliminate tax havens, and pledged to make a request to include this important issue in the agenda of the General Assembly agenda and to coordinate with G-77 countries to ban offshore secrecy.[100]

56. Another positive development was the announcement at the United Nations Conference of the Addis Tax Initiative,[101] pursuant to which developing countries will be assisted to build their domestic revenue systems. In the declaration issued by the partners to the Initiative, the participating countries and international organizations affirm that domestic resource mobilization and effective use is the crux of the common pursuit of sustainable development and achieving the Sustainable Development Goals. The partners commit to support countries that need assistance, including by substantially increasing official development assistance and technical assistance to build tax and fiscal management capacity, particularly in least developed countries; moreover, they agree to cooperate to combat tax evasion as well as tax avoidance.

B. Common Reporting Standard

57. Pursuant to the Common Reporting Standard devised by OECD in 2014, automatic exchange of financial account information will take place as of 2017 without the need for the recipient jurisdiction to make a request. In response to the Independent Expert's questionnaire, OECD stated that the impact of the Common Reporting Standard and improved transparency was already apparent, with at least €50 billion in additional revenues identified in countries that had put in place voluntary disclosure programmes and similar initiatives to allow taxpayers to come forward to correct their past tax transgressions. Observers, however, have identified loopholes concerning the high thresholds of ownership that prevent beneficial owners — the true owners of shell corporations — from being identified and the possibility of avoiding the identification of owners who hide behind an "active non-financial entity". Moreover, the Standard explicitly restricts the use of the information received to tax purposes and explicitly prohibits sharing the information with law enforcement authorities. Although OECD clarified that information might be exchanged with other law enforcement agencies if the sending party explicitly agreed, these restrictions might prevent cost-free synergies for fighting corruption and money-laundering.

58. BEPS refers to tax planning strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations where there is little or no economic activity. Although some of the schemes used are illegal, most are technically legal. BEPS has the potential to solve some aspects of multinational tax avoidance, but hitherto has failed to address key issues that face developing

[99] See www.taxjustice.net/wp-content/uploads/2013/04/GATJ-statement-GlobalTaxBodyPanamaPapers_18Apr2016.pdf.

[100] See www.andes.info.ec/en/news/president-rafael-correa-commits-end-offshore-secrecy.html; and http://www.telesurtv.net/news/Correa-propone-consulta-popular-sobre-paraisos-fiscales-en-Ecuador-20160715-0003.html.

[101] See www.taxcompact.net/documents/Addis-Tax-Initiative_Declaration.pdf.

countries. OECD has also developed an inclusive framework on BEPS. In October 2015, OECD unveiled a campaign to end tax havens and loopholes.[102] It has also developed a model tax convention.[103]

59. In September 2013, G-20 leaders endorsed the comprehensive Action Plan on Base Erosion and Profit Shifting.[104] Two years later, the G-20 proposed reinforced international standards and measures to help countries tackle BEPS. The package provides tools to ensure that profits are taxed where economic activities are performed and where value is created.

60. Speaking in Abu Dhabi on 22 February 2016, IMF Managing Director Christine Lagarde expressed the view that the BEPS project did not go far enough in creating an effective international tax system. She said that while the project had made significant progress, more work needed to be done in terms of both substance and scope. The BEPS rules had been designed to work within the traditional architecture for international taxation, developed nearly a century ago in a world where cross-border trade was less important and consisted almost entirely in physical goods. Today's challenges included the taxation of traded services and the shifting of intellectual property across borders, which was why an international tax system truly fit for the twenty-first century that would work for all economies was needed.[105]

61. On 14 April 2016, Ms. Lagarde advocated the strengthening of international efforts to curtail aggressive tax avoidance, so that the international tax system would no longer have loopholes available for rich people and companies to exploit. A perception that the rules are skewed towards some or do not apply to everyone constitutes a threat to the global economy. She warned that the world could no longer tolerate taxation being treated "as a local matter associated with sovereignty".[106]

62. The European Parliament has launched several initiatives to combat tax evasion,[107] while the European Commission has developed useful indicators to measure aggressive tax planning, including tax exemptions for royalties, advances and similar income derived from patents in respect of inventions, copyright and trademarks.

63. On 21 June 2016, the Special Committee on Tax Rulings II of the European Parliament adopted recommendations including the creation of a European Union public register of beneficial owners of companies, a tax-havens blacklist, sanctions against non-cooperative tax jurisdictions, action against abuse of patent box regimes for intellectual property revenues, a code of conduct for banks and tax advisers, tax good governance rules in all European Union trade agreements and a withholding

[102] See www.telegraph.co.uk/finance/economics/11912495/OECD-unveils-global-push-to-end-tax-havens-and-loopholes.html.

[103] See www.oecd.org/ctp/treaties/2014-model-tax-convention-articles.pdf.

[104] See www.oecd.org/ctp/BEPSActionPlan.pdf.

[105] See www.publicfinanceinternational.org/news/2016/02/international-tax-reforms-do-not-go-far-enough-says-lagarde.

[106] https://next.ft.com/content/9ce6c362-0262-11e6-af1d-c47326021344 (subscription required).

[107] See www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT%20REPORT%20A7-2013-0162%200%20DOC%20XML%20V0//EN.

tax on profits leaving the Union.[108] The European Parliament approved the recommendations on 6 July 2016.[109]

64. In order for Governments to be able to fund Sustainable Development Goals and deliver on their human rights obligations to provide public health care, education, water and sanitation, affordable housing and transportation, all countries must have an equal seat at the table to determine equitable international tax practices.

C. A financial transactions tax

65. In the *World Economic and Social Survey 2012*, titled *In Search of New Development Finance*, the United Nations proposed an international tax, combined with other innovative financing mechanisms, to raise more than $400 billion annually for development and global challenges such as fighting climate change.[110]

66. In October 2012, Christine Lagarde said that a financial transactions tax was a step in the right direction.[111] According to the Centre for Economic and Policy Research,[112] a set of scaled transactions taxes, imposed on transfers of stock and other financial assets, could raise more than $100 billion a year. This revenue could be used for environmental protection and sustainable development worldwide. Although there is growing momentum,[113] such a "Tobin tax" is far from being adopted.[114]

D. Development agenda of the United Nations Conference on Trade and Development

67. The *World Investment Report 2015: Reforming International Investment Governance* devotes an entire chapter to international tax and investment policy coherence. Awareness of the problems, however, is only a first step towards solving them. UNCTAD observes:

> Tax avoidance and the lack of transparency in international financial transactions are global issues that require a multilateral approach, with adequate developing-country participation ... International cooperation is fundamental to prevent harmful tax competition; competition to attract investment should not lead to a race to the bottom. International cooperation is also important for the success of transparency initiatives, such as the Extractive Industries Transparency Initiative. ... Such initiatives should ideally not focus only on governments, but also on companies.

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[108] See www.europarl.europa.eu/news/en/news-room/20160621IPR33011/MEPs-call-for-tax-haven-black-list-patent-box-rules-CCCTB-and-more.

[109] See http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0310+0+DOC+XML+V0//EN&language=EN#BKMD-14.

[110] See www.un.org/en/development/desa/news/policy/wess2012.html; and www.un.org/esa/ffd/wp-content/uploads/2012/03/2011esm_NGO1.pdf.

[111] See http://robinhoodtax.org.uk/content/response-imf-chief-christine-lagarde-supporting-financial-transaction-tax.

[112] See http://cepr.net/documents/publications/financial-transactions-tax-2008-12.pdf.

[113] See http://cepr.net/documents/Support_for_FTT_09-14.pdf.

[114] See http://mondediplo.com/2016/05/08tobin.

68. The report further states that "tax avoidance practices are responsible for a significant leakage of development finance resources. An estimated $100 billion of annual tax revenue losses for developing countries is related to inward investment stocks directly linked to offshore hubs." Oxfam has adopted this figure as the estimated loss for developing countries as a result of corporate tax dodging. For the purpose of its research, UNCTAD identifies offshore investment hubs with reference to the OECD 2000 list of tax havens, plus jurisdictions that offer special purpose entity. IMF defines special purpose entities as "autonomous legal entities, directly or indirectly wholly foreign owned, that are part of a group of companies, without substantial real economic links with the host economy, engaged in a variety of cross-border financial activities, which are aimed at the passing through of all types of financial and non-financial assets, liabilities and related income to third countries". They include Austria, Hungary, Luxembourg and the Netherlands, with the latter two accounting for the bulk of transit foreign direct investment. UNCTAD recognizes that the list of jurisdictions publishing special purpose entity investment data is increasing rapidly.[115]

69. At UNCTAD XIV, delegations prevented a neoliberal takeover of the future UNCTAD agenda and succeeded in including useful language in the outcome document:[116]

> Given growing concerns about external debt sustainability, public debt management to prevent and pre-empt financial and debt crises is important. The need for a central data registry, including information on debt restructuring, has also been recognized. In this regard, the longstanding work of UNCTAD on debt issues within the United Nations, including through promotion of its Principles on Promoting Responsible Sovereign Lending and Borrowing, is recognized. The work of the United Nations, the International Monetary Fund and the World Bank remains important.
>
> ...
>
> Effective taxation will be critical in the mobilization of resources for implementation of the Sustainable Development Goals and overall economic advancement of developing countries. This includes reducing opportunities for tax avoidance, as well as addressing illicit financial flows and the activities that underlie their occurrence, such as tax evasion, illegal exploitation of natural resources, corruption, embezzlement and fraud. This is a global issue that requires further multilateral cooperation. Current initiatives should also be more inclusive with regards to the participation of developing countries.

[115] See http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf.

[116] The text quoted is from the final agreed negotiated text of the consensus document (Nairobi Maafikiano), chap. I, sect. A, sub-theme 1, Challenges and opportunities in multilateralism for trade and development. As of the date of submission of the present document, the final report of the conference had not been issued.

E. International Monetary Fund: change of mindset?

70. A recent paper by IMF economists Jonathan Ostry, Prakash Lougani and Davide Furceri[117] and statements by Christine Lagarde[118] give reason for hope that international organizations like IMF can gradually abandon neoliberal mantras and start applying a human rights-based approach to their short-, medium- and long-term programmes. It is obvious that capital inflows in the form of portfolio investment and banking and speculative debt influxes do not boost growth and put populations at risk. Capital account liberalization has given way to the recognition that capital controls are needed to deal with the volatility of capital flows.

F. Taxes and military expenditures

71. As the Independent Expert substantiated in his 2014 report to the Human Rights Council (A/HRC/27/51), lobbies for the military-industrial complex exercise an undemocratic influence on parliaments and many countries devote an unconscionably high percentage of the discretionary budget to military-related activities. Bearing in mind that article 18 of the International Covenant on Civil and Political Rights recognizes the right to conscientious objection to war, the question arises whether individuals have a right to withhold taxes that are used for war or military research, e.g., for lethal autonomous weapons systems.[119] A parliamentary bill in the United Kingdom aims at recognizing the right of individuals to opt out of war for moral reasons and to opt out of paying taxes for war, since through taxes they would be financing what they deem immoral. If Governments were to recognize this right and devote the taxes of conscientious objectors to conflict-prevention measures, this would be a significant step for civilization.[120]

V. Conclusions

72. **Tax avoidance, tax evasion and tax havens deprive countries of revenue needed to fulfil human rights treaty obligations, alleviate poverty, improve the administration of justice, ensure that remedies a.. available to victims of human rights violations, build infrastructures, create jobs and provide social security, quality health services and free education.**

73. **Because the tax activities of domestic and transnational corporations have significant direct and indirect socioeconomic impacts, a binding legal instrument on corporate social responsibility[121] stipulating the obligation to pay taxes where the profits are generated and a prohibition on shifting profits**

[117] See www.imf.org/external/pubs/ft/fandd/2016/06/ostry.htm.

[118] See www.imf.org/en/News/Articles/2015/09/28/04/53/sp041116, www.imf.org/en/News/Articles/2015/09/28/04/53/sp040516; and www.imf.org/en/News/Articles/2015/09/28/04/53/sp011216.

[119] See www.unog.ch/80256EE600585943/(httpPages)/37D51189AC4FB6E1C1257F4D004CAFB2.

[120] See www.conscienceonline.org.uk/wp-content/uploads/2016/06/Taxes-for-Peace-Bill-2016.pdf. "Every gun that is made, every warship launched, every rocket fired signifies, in the final sense a theft from those who hunger and are not fed, those who are cold and are not clothed. This world in arms is not spending money alone. It is spending the sweat of its labourers, the genius of its scientists, the hopes of its children. Dwight D. Eisenhower"

[121] See Human Rights Council resolution 26/9; and www.globalreporting.org/Pages/FR-CSX-2016.aspx.

should be adopted. This would encourage responsible tax behaviour that does not harm global financial stability, development and human rights.

74. **While the end of tax havens is not in sight, Governments are gradually coming to realize that it is in their own interest to phase out secrecy jurisdictions. An international tax convention is necessary to stop competition among tax jurisdictions and abolish secrecy.**

75. **Taxation should be used to advance human rights. Fiscal and budgetary policy should be reformed with a view to achieving fair taxation by abolishing tax havens and "sweetheart" deals, closing loopholes and rejecting *contra bonos mores* schemes and abuse of rights.[122] Progressive redistributive taxation polices will produce funding for vital public services that will reduce inequality and poverty and lead to sustainable development.**

VI. Recommendations

76. **Bearing in mind that taxation has an impact on human rights and on the international order, the Independent Expert suggests the following action plan:**

77. **States should:**

(a) **Establish an intergovernmental tax body under the auspices of the United Nations with the mandate to elaborate a United Nations convention on taxation and international cooperation in tax matters;**

(b) **Adopt a common United Nations standard for multilateral and automatic exchange of tax information;**

(c) **Implement corporate tax and financial transparency, including public registries of ultimate beneficial ownership;**

(d) **Ensure that multinational corporations are treated as single entities conducting business across international borders;**

(e) **Enact legislation requiring country-by-country reporting and automatic and multilateral exchange of financial information, so as to reveal the misalignment between where business activity takes place and where profits**

[122] "The doctrine of abuse of rights (or *abus de droit*) is one of the many outgrowths of the legal principle of good faith." Sir Robert Jennings, ed., *Oppenheim's International Law*, 9th ed., p. 407. "The doctrine prevents a Party to an agreement from exercising its rights in a way that is unreasonable in the light of the spirit of the agreement. Used frequently in international courts, the idea behind the abuse of rights doctrine is being increasingly recognized as a norm of international law." According to Sir Hersch Lauterpacht, the concept of abuse of rights is present in most developed legal systems and "it is only at a rudimentary stage of legal development that society permits the unchecked use of rights without regard to its social consequences". *The Development of International Law by the International Court* (1958), p. 162. See also Lauterpacht, *The Function of Law in the International Community* (1933), chap. 14 and a review of the 2011 republication of this work by Isabel Feichtner in *European Journal of International Law*, vol. 22, No. 4 (2011), pp. 1177-1179; G.D.S. Taylor, "The content of the rule against abuse of rights in international law", *British Yearbook of International Law*, vol. 46 (1972-1973), also citing Lauterpacht; and Alexandre Kiss, "Abuse of rights" in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, vol. I (2012), pp. 20-26.

are declared and tax paid. Data should be made fully public so that citizens can hold multinationals and tax authorities to account;

(f) Abolish "sweetheart" tax deals; States members of the European Union should revise the Code of Conduct on business taxation to specifically prohibit "sweetheart" deals;

(g) Conduct systematic human rights impact assessments to monitor the spillover effects of their tax policies and agreements domestically and overseas. These should be periodic and independently verified;

(h) Impose criminal penalties for abusive tax practices and abolish tax amnesties;

(i) Enact legislation to protect whistle-blowers and witnesses, and ensure that individuals who want to share information about corporate tax practices which harm human rights are not prosecuted or subjected to reprisals; States should cease punishing individuals for disclosing information that the public has a right to receive pursuant to article 19 of the International Covenant on Civil and Political Rights. A charter on the rights of whistle-blowers and a "protected disclosure defence" should be adopted, pursuant to which criminal or civil liability for protected disclosures is waved and an "authorized channel" is provided for such disclosures;

(j) Introduce a financial transactions tax and enforce it;

(k) Pursue efforts to collect taxes, imposing fines on tax evaders, and use the revenue to fulfil human rights treaty obligations, in particular the administration of justice, health and education. States should cease imposing "austerity measures" in the social sector and exercise austerity with regard to military expenditures;

(l) Agree on a minimum corporate tax rate and curb tax competition among countries, acknowledging that this policy facilitates corruption, bribery and money-laundering;

(m) Audit banks, law firms and accounting and consulting firms that specialize in establishing anonymous, shell or mailbox companies that serve no purpose other than to avoid taxes;

(n) Test the inter-State complaints procedure under article 41 of the International Covenant on Civil and Political Rights and article 10 (1) of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, e.g., concerning the extraterritorial liability of States for the activities of transnational corporations and banks, in particular concerning the loss of tax revenues through the operation of tax havens. These matters should be systematically reviewed when State party reports are examined.

78. Parliaments should:

(a) Exercise their oversight functions concerning the human rights impacts of fiscal policies and the domestic and extraterritorial effects of tax havens;

(b) **Proactively inform their constituents of the aims and consequences of fiscal policies and endeavour to achieve tax justice domestically and internationally;**

(c) **Adopt robust legislation to protect whistle-blowers and witnesses from harassment and/or prosecution.**

79. **The General Assembly should:**

(a) **Revise the Guiding Principles on Business and Human Rights and support the adoption of a legally binding instrument on corporate social responsibility prohibiting "aggressive tax avoidance", tax fraud, tax evasion and tax havens;**

(b) **Refer relevant legal questions to the International Court of Justice for advisory opinions.**

80. **UNCTAD should develop a strategy to protect the policy space of States in controlling capital flows, in particular to curb and criminalize illicit financial flows and the flight of moneys to tax havens, in cooperation with the Office of the United Nations High Commissioner for Human Rights and the United Nations Office on Drugs and Crime.**

81. **OECD should facilitate the sharing of information collected under CRS by the recipient jurisdiction with other relevant government authorities to tackle corruption and money-laundering.**

82. **The International Monetary Fund, the World Bank and central banks should refuse loans to countries that harbour tax havens. No project should be subsidized if the enterprises involved use secrecy jurisdictions.**

83. **Domestic banks should investigate the origin of the deposits and investments they administer and return illicit funds held by corporations and kleptocrats to the countries of origin.**

84. **The International Court of Justice should issue an advisory opinion holding that tax havens are *contra bonos mores* and against international *ordre public*.**

85. **Members of civil society should:**

(a) **Demand more direct democracy in matters such as taxation. They should demand participatory democracy and expose so-called "representative democracy" when it ceases to represent the voice of the people and becomes subservient to corporate lobbies;**

(b) **Demand referendums on important issues, including a financial transactions tax, the outlawing of tax havens and runaway military expenditures;**

(c) **Demand a reduction of military expenditures. Bearing in mind that article 18 of the International Covenant on Civil and Political Rights protects the right of conscientious objection, this right should also shield citizens from prosecution if they engage in peaceful civil disobedience and refuse to contribute to the arms race and to governmental activities that threaten article 6 of the International Covenant on the right to life, and violate article 20 (1) of**

the International Covenant, which prohibits propaganda for war. Conscientious objectors should insist that their taxes be used for conflict-prevention policies;

(d) International non-governmental organizations such as Amnesty International, Human Rights Watch, International Service for Human Rights and International Federation for Human Rights should add tax fairness and the abolition of tax havens to their urgent goals.

86. **Law schools and business schools should:**

(a) Include ethics and corporate social responsibility as obligatory disciplines in their curricula. Bar associations should test candidates thereon. The legal profession must not be silent when members of the bar seriously undermine social policies by creating fraudulent companies and other schemes for tax avoidance purposes;

(b) Instil a sense of responsibility in students as prospective lawyers and business executives. They must be taught that they have a duty to serve society and to promote human rights. Teaching "aggressive tax avoidance" is unethical. Students must understand the difference between legitimate profit and looting of society.

VII. Postscript

87. The Independent Expert thanks Governments, intergovernmental organizations, non-governmental organizations, academia and experts for their insightful answers to his questionnaires, and reiterates his appreciation to the committed, hard-working and competent secretariat of the Office of the United Nations High Commissioner for Human Rights. The General Assembly should allocate considerably greater resources to the Office, the Human Rights Council and its special procedures, the treaty bodies and UNCTAD.

Annex

Tax Justice Network secrecy index ranking, 2015[a]

1. Switzerland
2. Hong Kong, China
3. United States of America
4. Singapore
5. Cayman Islands*
6. Luxembourg
7. Lebanon
8. Germany
9. Bahrain
10. United Arab Emirates (Dubai)
11. Macao, China
12. Japan
13. Panama
14. Marshall Islands
15. United Kingdom of Great Britain and Northern Ireland

* British Overseas Territory. If the United Kingdom and its Overseas Territories and Crown Dependencies were assessed together, it would be at the top.

[a] See www.financialsecrecyindex.com/.

United Nations A/71/287

General Assembly

Distr.: General
4 August 2016

Original: English

Seventy-first session
Item 69 (b) of the provisional agenda*
Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms

Human rights and unilateral coercive measures

Note by the Secretary-General

The Secretary-General has the honour to transmit to the General Assembly the report prepared by the Special Rapporteur of the Human Rights Council on the negative impact of unilateral coercive measures on the enjoyment of human rights, submitted in accordance with Human Rights Council resolution 27/21.

* A/71/150.

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Report of the Special Rapporteur of the Human Rights Council on the negative impact of unilateral coercive measures on the enjoyment of human rights, Idriss Jazairy

Summary

The present report focuses on issues of remedies and redress for victims of unilateral coercive measures, as mandated by Human Rights Council resolution 30/2 and General Assembly resolution 70/151. The topic is examined from a conceptual point of view, including a review of the conceptual aspects of remedies for violations of human rights caused by unilateral coercive measures in general international law, in international human rights law and in international humanitarian law. The report is to be read in conjunction with the report that the Special Rapporteur has submitted to the thirty-third session of the Human Rights Council (A/HRC/33/48), which presents a preliminary review and evaluation of the various mechanisms actually (or potentially) available to States and to individuals affected by unilateral coercive measures to seek remedy and redress.

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I. Introduction

1. The present report is submitted by the Special Rapporteur of the Human Rights Council on the negative impact of unilateral coercive measures on the enjoyment of human rights to the General Assembly, in accordance with resolution 30/2 of the Human Rights Council and resolution 70/151 of the General Assembly.

2. In its resolution 30/2, adopted on 1 October 2015, the Human Rights Council requested the Special Rapporteur "to focus on the negative impact of unilateral coercive measures on the enjoyment of human rights of victims and to address the issues of remedies and redress with a view to promoting accountability and reparations in his next reports to the Human Rights Council and the General Assembly". In its resolution 70/151, adopted on 17 December 2015, the General Assembly also requested the Special Rapporteur to submit an interim report on the implementation of resolution 70/151 and on the negative impact of unilateral coercive measures on the enjoyment of human rights of victims and the issues of remedies and redress.

3. The present report is in line with the mandate of the Special Rapporteur, which, pursuant to resolution 27/21 of the Human Rights Council, extends, inter alia, to the making of "guidelines and recommendations on ways and means to prevent, minimize and redress the adverse impact of unilateral coercive measures on human rights" and of "an overall review of independent mechanisms to assess unilateral coercive measures to promote accountability".

4. The present report is to be read in conjunction with the report that the Special Rapporteur has submitted to the thirty-third session of the Human Rights Council (A/HRC/33/48). In that report, the Special Rapporteur has listed the key activities carried out under his mandate between July 2015 and June 2016. He has also addressed the issues of remedies and redress for victims of unilateral coercive measures, through a preliminary review, assessment and evaluation of the various mechanisms available to victims.

II. Scope of the study

5. The Special Rapporteur wishes to emphasize at the outset that, given the complexity of the topics addressed by the present report and their multifaceted and intricate aspects, the findings set out in the present report and the recommendations formulated are preliminary and tentative. Such findings and recommendations are therefore to be supplemented at a later stage of the mandate. The Special Rapporteur welcomes in advance all comments, relevant information and suggestions that Governments, non-governmental organizations and any other interested parties may have regarding remedies and redress in relation to the negative impact of unilateral coercive measures on human rights.

6. For the sake of clarity and efficiency, the Special Rapporteur decided to address the issues of remedies and redress for unilateral coercive measures from two different angles, corresponding to his two annual reports. In the present report, the topic is examined mostly from a conceptual viewpoint, i.e. a review of the conceptual aspects of remedies for violations of human rights caused by unilateral coercive measures in general international law, in international human rights law and in international humanitarian law. In the report submitted to the thirty-third

session of the Human Rights Council, the Special Rapporteur addressed the topic from a procedural perspective, i.e. with a focus on the various mechanisms actually (or potentially) available to States affected by unilateral coercive measures and to individuals who are victims of unilateral coercive measures. He has thus reviewed and evaluated the remedies available to States under the Charter of the United Nations and under dispute settlement mechanisms and forums such as the International Court of Justice, inter-State arbitration and the dispute settlement system of the World Trade Organization. He has also covered remedies available to individuals and entities affected by unilateral coercive measures, i.e. domestic remedies and remedies actually or potentially available through human rights bodies, claims commissions and regional or international courts.

7. The concepts of remedies, redress, accountability and reparation that are the focus of the present report need some preliminary clarifications. **Remedies** are generally considered to embody two separate meanings:

> "In the first sense, remedies are the processes by which arguable claims of human rights violations are heard and decided, whether by courts, administrative agencies, or other competent bodies. The second notion of remedies refers to the outcome of the proceedings, the relief afforded the successful claimant".[1]

8. **Redress** usually refers to the substantive remedies afforded victims of violations. In that meaning remedies and redress can be used interchangeably, as "the range of measures that may be taken in response to an actual or threatened violation of human rights".[2]

9. **Accountability** in the context of international law refers to a range of mechanisms through which international actors may be held responsible for the violation of certain rules. The following definition has been proposed:

> "International legal accountability involves the legal justification of an international actor's performance vis-à-vis others, the assessment or judgment of that performance against international legal standards, and the possible imposition of consequences if the actor fails to live up to applicable legal standards".[3]

10. Against that background, the concept of **reparation**, commonly used in the law of international responsibility in the context of inter-State claims (or claims involving States and international organizations) appears as one of the legal mechanisms designed to ensure accountability in inter-State relations or relations between States and international organizations.

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[1] Dinah Shelton, *Remedies in International Human Rights Law* (Oxford, Oxford University Press, 2015).

[2] Ibid.

[3] Jutta Brunnée, "International legal accountability through the lens of the law of State responsibility" in *Netherlands Yearbook of International Law*, vol. 36, No. 1, R. A. Wessel and W. J. M. van Genugten, eds. (2005).

III. Remedies for violations of human rights caused by unilateral coercive measures: a conceptual framework

A. Remedies in general international law: the law of international responsibility

11. Unilateral coercive measures cannot avail themselves of the authority of the Security Council, which is precisely what makes them "unilateral" as opposed to "multilateral" (see A/HRC/30/45 and A/HRC/28/740), and as a consequence cannot be legally justified under the legal framework of Chapter VII of the Charter of the United Nations. Under international law, unilateral coercive measures therefore require some other legal justification in order not to qualify as breaches of international law.[4] Put differently, to the extent that unilateral coercive measures should fit with the legal regime of "countermeasures", the intrinsic unlawfulness of unilateral coercive measures is precluded only as far as they qualify as a countermeasure taken against the targeted State.[5] That in turn implies that, in the event that States (or international organizations) resort to such sanctions without proper justification, their international responsibility could be engaged. As noted by the International Law Commission, a "State which resorts to countermeasures based on its unilateral assessment of the situation does so at its own risk and may incur responsibility for its own wrongful conduct in the event of an incorrect assessment".[6] Such responsibility could also be engaged in a situation where, even acting with proper justification, States (or international organizations) are found to have disregarded legal preconditions for recourse to countermeasures, such as the proportionality and reversibility of the measures. It has been noted in that respect, considering economic sanctions, that:

> "If the peacetime measures of economic warfare are in violation of obligations of the acting State under international law and cannot be justified as countermeasures, they will engage the international responsibility of the State.

[4] See Antonios Tzanakopoulos, "Sanctions imposed unilaterally by the European Union: implications for the European Union's international responsibility", in *Economic Sanctions under International Law*, Ali Z. Marossi and Marisa R. Bassett, eds. (The Hague, T. M. C. Asser Press/Springer, 2015).

[5] See article 22 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, (A/56/10): "The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State...". For an application to the case of the sanctions applied in 2012 by the European Union and its member States against the Islamic Republic of Iran, see Pierre-Emmanuel Dupont, "Unilateral European sanctions as countermeasures: the case of the EU measures against Iran" in *Economic Sanctions and International Law*, Matthew Happold and Paul Eden, eds. (Oxford/Portland, Oregon, Hart Publishing, 2016).

[6] See commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts commentary on art. 49 (A/56/10). It has also been noted that, in case of sanctions, "[t]he lawfulness of the action on the international plane depends, in the first place, on the effective occurrence of the international wrongful act by the target State", Tarcisio Gazzini, "The normative element inherent in economic collective enforcement measures: United Nations and European Union practice" in *Les sanctions économiques en droit international/Economic sanctions in international law*, Linos-Alexandre Sicilianos and Laura Picchio Forlati, eds. (Leiden, Martinus Nijhoff, 2004).

They will thus themselves serve as grounds for resort to countermeasures or even self-defence by the injured State".[7]

12. The law of international responsibility of States (and of international organizations) could be very relevant in the context of the search for some degree of accountability for unlawful recourse to unilateral coercive measures. It could offer a remedy for the State affected and, indirectly, a form of remedy for its people or entities affected by the measures. However, such remedy appears quite limited, as it is not always possible for an affected State to bring a claim before an international forum, as no such forum may be available in the relations between the affected State and the targeting State(s) (or international organization). In practice claims brought by targeted States willing to challenge the application of unilateral coercive measures appear to be very rare. In the 1980s, Nicaragua challenged various hostile actions taken against it by the United States of America before the International Court of Justice, including the general embargo on trade with Nicaragua implemented by the United States. The Court found that by declaring a general embargo on trade with Nicaragua, the United States had acted in breach of its obligations under the 1956 Treaty of Friendship, Commerce and Navigation between the two countries and was thus under an obligation to make reparation for such breaches. The Court stressed that while, as a matter of principle, "a State is not bound to continue particular trade relations longer than it sees fit to do so, in the absence of a treaty commitment or other specific legal obligation", however, "where there exists such a commitment, of the kind implied in a treaty of friendship and commerce, such an abrupt act of termination of commercial intercourse as the general trade embargo of 1 May 1985 will normally constitute a violation of the obligation not to defeat the object and purpose of the treaty". More recently, the Islamic Republic of Iran initiated proceedings before the Court against the United States, alleging violations of the 1955 United States-Iran Treaty of Amity in relation to United States measures targeting Iranian entities, including the Iranian Central Bank.[8]

[7] See Vaughan Lowe and Antonios Tzanakopoulos, "Economic warfare", *Max Planck Encyclopedia of Public International Law*, Rüdiger Wolfrum, ed. (Oxford, Oxford University Press, 2012). See also Daniel H. Joyner, "International legal limits on the ability of States to lawfully impose international economic/financial sanctions", *Economic Sanctions under International Law*, Ali Z. Marossi et Marisa R. Bassett, eds. (The Hague, T. M. C. Asser Press/Springer, 2015).

[8] See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986 and *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, application of the Islamic Republic of Iran instituting proceedings, 14 June 2016, available from http://www.icj-cij.org/docket/files/164/19038.pdf. See also Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran. Article IV of the Treaty provides, inter alia, that "Each High Contracting Party shall at all times accord fair and equitable treatment to nationals and companies of the other High Contracting Party, and to their property and enterprises, shall refrain from applying unreasonable or discriminatory measures that would impair their legally acquired rights and interests, and shall assure that their lawful contractual rights are afforded effective means of enforcement, in conformity with the applicable laws". Article XXI (2) of the Treaty provides that "Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means".

I. International responsibility of States

13. States having recourse to unilateral coercive measures without proper justification, notably based on an erroneous unilateral assessment of the existence of an internationally wrongful act by the targeted State, or acting in violation of the procedural and substantive preconditions for recourse to countermeasures, may see their international responsibility engaged.[9] That is an application of the general rule, formulated in article 1 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts according to which: "Every internationally wrongful act of a State entails the international responsibility of that State".

14. In terms of legal consequences, the responsible State "is under an obligation to make full reparation for the injury caused by the internationally wrongful act".[10] The Draft Articles set out the various forms under which reparation can take place:

> "Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination...".[11]

15. "Restitution", i.e. the action to re-establish the situation which existed before the wrongful act was committed, is the primary form of reparation.[12] However, the State responsible for an internationally wrongful act is also "under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution".[13] Finally, there may be an obligation for the responsible State to give "satisfaction" for the injury caused.[14]

16. There is no reason why those general rules could not be applied to the context of unilateral coercive measures, found to have been taken without proper justification or in violation of substantive or procedural preconditions for recourse to countermeasures. That presupposes that an international court or tribunal, having jurisdiction over disputes such as those arising from the imposition of unilateral coercive measures by virtue of a treaty in force in the relations between the parties (or, in exceptional cases, by virtue of a special agreement between the parties), determines that the unilateral coercive measure in question has entailed a breach of treaty or customary obligations of the targeting State, amounting to an internationally wrongful act, and as a consequence that the State concerned is under

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[9] See Draft Articles on Responsibility of States for Internationally Wrongful Acts, art. 1. Article 2 states that "There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State. See also, as regards the international responsibility that may be incurred by international organizations, International Law Commission, draft articles on responsibility of international organizations, with commentaries, in A/66/10 and Add.1.

[10] Ibid., art. 31 (1). Article 31 (2) adds that "Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State".

[11] Ibid., art. 34.

[12] Ibid., art. 35. "A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution: (a) is not materially impossible; (b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation".

[13] Ibid., art. 36 (1). Article 36 (2) states that "The compensation shall cover any financially assessable damage including loss of profits insofar as it is established".

[14] Ibid., art. 37.

an obligation to make reparation. The international court or tribunal concerned is then generally competent to pronounce on the nature or extent of the reparation to be made for the breach of an international obligation. In the case of *Nicaragua v. United States of America*, the International Court of Justice found that the United States was "under an obligation to make reparation" to Nicaragua and further decided "that the form and amount of such reparation, failing agreement between the Parties, will be settled by the Court ...".[15]

17. However, as already observed, there may be situations where no treaty is in force in the relations between the targeting and the targeted State, which would arguably provide for the jurisdiction of an international court or tribunal in the event of a dispute related to measures such as the imposition of unilateral coercive measures. The targeted State is then deprived of any opportunity to seek reparation unilaterally before an international court or tribunal. In such situation, the targeted State remains dependent on the willingness of the targeting State(s) to see the lawfulness of its imposition of unilateral coercive measures reviewed by an international court or tribunal, which generally can hardly be expected. Also, more generally it must be noted that there is a mixed record of compliance by States with decisions of the International Court of Justice or of other international courts and tribunals.

2. International responsibility of international organizations

18. It is now well stablished in international law that international organizations may be subject to claims against them based on their unlawful conduct, i.e. for wrongful acts committed in the conduct of their activities,[16] for example if they commit (or contribute to) human rights violations, or harm to the environment.[17] The Draft Articles on the Responsibility of International Organizations, adopted by the International Law Commission in 2011 and mirroring the Draft Articles on State Responsibility, make clear that "Every internationally wrongful act of an international organization entails the international responsibility of that organization".[18]

19. The imposition of unilateral coercive measures by international (regional) organizations may thus entail the international responsibility of the latter, e.g. when such unilateral coercive measures are found to violate the principle of non-intervention, which is recognized as part of customary international law and *ius*

[15] See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, International Court of Justice, Merits, Judgment of 27 June 1986.

[16] In its advisory opinion on the Interpretation of the Agreement of 25 March 1951 between the World Health Organization and Egypt, the International Court of Justice clearly stated that "International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties." See also A/CN.4/532, Alain Pellet, "The definition of responsibility in international law" in *The Law of International Responsibility*, James Crawford, Alain Pellet and Simon Olleson, eds. (Oxford, Oxford University Press, 2010), and C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (Cambridge, Cambridge University Press, 2005).

[17] See Evarist Baimu and Aristeidis Panou, "Responsibility of international organizations and the World Bank Inspection Panel: parallel tracks unlikely to converge?" in *The World Bank Legal Review*, vol. 3, Hassane Cissé, Daniel D. Bradlow and Benedict Kingsbury, eds. (Washington, D.C., World Bank, 2011).

[18] Article 3, Draft Articles on the Responsibility of International Organizations, with commentaries (A/66/10).

cogens[19] and explicitly formulated in Article 2, paragraph 7, of the Charter of the United Nations.

20. It may be added that international (regional) organizations should also be considered as bound by relevant norms of human rights law in the context of their sanctions policy. International organizations implementing unilateral coercive measures remain in all cases bound by the obligation to take into account the economic, social and cultural rights of the populations of the targeted country, as set forth in the International Covenant on Economic, Social and Cultural Rights. It was made clear by the Committee on Economic, Social and Cultural Rights in its general comment No. 8 (1997) on the relationship between economic sanctions and respect for economic, social and cultural rights that any "external entity" applying economic sanctions on a country is under an obligation "'to take steps, individually and through international assistance and cooperation, especially economic and technical' in order to respond to any disproportionate suffering experienced by vulnerable groups within the targeted country". That applies equally to States and international organizations.[20] It is noteworthy, for example, that with respect to the right to health, recognized in article 12 of the Covenant, in its general comment No. 14 (2000) on the right to the highest attainable standard of health, the Committee highlighted the role of States in their capacity as members of international financial institutions:

> "States parties have an obligation to ensure that their actions as members of international organizations take due account of the right to health. Accordingly, States parties which are members of international financial institutions, notably the International Monetary Fund, the World Bank, and regional development banks, should pay greater attention to the protection of the right to health in influencing the lending policies, credit agreements and international measures of these institutions."

That observation may be transposed to other rights protected under the Covenant[21] and may also be deemed relevant to any international (regional) organizations, i.e. other than international financial institutions.

21. The issue of the potential shared or joint international responsibility and the allocation of responsibility between States and international organizations for unlawful and/or harmful unilateral coercive measures should also be briefly mentioned. The law of international responsibility is obviously relevant to situations where multiple actors (State(s) and/or international organization(s)) contribute to harmful outcomes of the imposition of unilateral coercive measures.[22] As regards, for

[19] See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, International Court of Justice, Merits, Judgment of 27 June 1986. See also Philip Kunig, "Intervention, prohibition of" in *Max Planck Encyclopedia of Public International Law*, vol. VI, Rüdiger Wolfrum, ed. (Oxford, Oxford University Press, 2012).

[20] In its general comment No. 8, the Committee stressed that obligations under the Covenant concerned "the party or parties responsible for the imposition, maintenance or implementation of the sanctions, whether it be the international community, an international or regional organization, or a State or group of States".

[21] See, for example, Fons Coomans, "Application of the International Covenant on Economic, Social and Cultural Rights in the framework of international organisations" in *Max Planck Yearbook of United Nations Law*, vol. 11, Armin von Bogdandy and Rüdiger Wolfrum, eds. (Leiden/Boston, Brill/Nijhoff, 2007).

[22] On shared responsibility in international law in general, see, for example, André Nollkaemper and Ilias Plakokefalos, eds., *Principles of shared responsibility in international law* (Cambridge, Cambridge University Press, 2014).

example, unilateral coercive measures decided by the European Union and implemented by its member States, it has been suggested that, by virtue of the rule of "dual attribution", "measures imposed by the EU and implemented by EU Member State organs may be attributable also to the acting Member States. If the measures are also in breach of Member States' individual obligations and are not justifiable as countermeasures, they may be challenged before the ICJ as against the acting Member State".[4]

B. Remedies in international human rights law

22. The right to a remedy for violations of international human rights law is enshrined in a number of multilateral instruments.[23] Article 8 of the Universal Declaration of Human Rights provides for a right to "an effective remedy" to everyone whose fundamental rights are violated. A right to a remedy for victims of violations of international human rights law is also found, for example, in article 2 of the International Covenant on Civil and Political Rights, article 39 of the Convention on the Rights of the Child, article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination and article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

23. Similarly, a right to a remedy is affirmed in regional conventions such as the African Charter on Human and Peoples' Rights (article 7) and the American Convention on Human Rights (article 25). The European Convention for the Protection of Human Rights and Fundamental Freedoms provides for "an effective remedy" for individuals whose rights and freedoms protected under the Convention have been violated.[24]

24. The right to a remedy was reaffirmed by the General Assembly in its resolution 60/147 on the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, of 16 December 2005, which provide, inter alia, that the obligation to respect, ensure respect for and implement international human rights law and international humanitarian law includes a duty to provide "those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice ..., irrespective of who may ultimately be the bearer of responsibility for the violation" and to provide "effective remedies to victims, including reparation".

25. That theoretical (or conceptual) right to a remedy is now increasingly given substance, as it is implemented through procedural mechanisms enabling individuals to complain about violations of their treaty-based human rights committed by States. The Optional Protocols to both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights have established committees before which individuals can bring such complaints against States. A similar procedure exists under a number of other multilateral instruments, such as the Convention on the Rights of the Child.

[23] See generally Richard Falk, "Reparations, international law, and global justice: a new frontier" in *The Handbook of Reparations* (Oxford, Oxford University Press, 2006) and Dinah Shelton, *Remedies in International Human Rights Law*, 3rd ed. (Oxford, Oxford University Press, 2015).

[24] See generally Dinah Shelton, *Remedies in International Human Rights Law*.

26. The regime of recourse to the European Court of Human Rights under the European Convention on Human Rights is also a significant development in terms of access of individuals to remedies for violations of human rights. As regards European Union sanctions, it is also noteworthy that they may be subject in principle to full-scope judicial review, including of their conformity with the fundamental rights recognized in the European Union, before the General Court and on appeal before the European Court of Justice, upon actions initiated by targeted individuals or entities.[25] Faced with an increasing number of challenges to individual sanctions brought by targeted entities or individuals pursuant to the provisions of the Treaty on the Functioning of the European Union, those jurisdictions have developed over time a jurisprudence setting some (mainly procedural) standards for European sanctions to comply with rule of law principles, including due process, even if only partially. That is a very significant first step forward, for which the jurisdictions of the European Union deserve to be commended. The Special Rapporteur is of the view that the system of judicial review of sanctions now applied in the European Union, which is unrivalled worldwide, could usefully be replicated by other States (or groups thereof) emitting sanctions. It is also noteworthy that an action for annulment of European Union restrictive measures against a specific country may in principle be brought before the European Union courts by the Government of a targeted State under article 263 of the Treaty on the Functioning of the European Union, provided that the State concerned establishes that the measure complained of is of direct concern to it.[26] Some weaknesses in the existing system need, however, to be noted. In particular, it remains unclear whether individuals or entities found to have been unlawfully subject to European Union sanctions could be awarded damages before European Union courts (see A/HRC/33/48). The widely applied practice of the Council of the European Union of "re-listing" de-listed individuals or entities on other grounds is also a matter of concern (as well as, in the view of the Special Rapporteur, a challenge to the authority of the European Union courts). Likewise, the pressure put on those courts by some States, which have publicly criticized the de-listing jurisprudence signals that the latter remains a fragile achievement (ibid.).

27. Those mechanisms are of course relevant to complaints brought by victims of human rights violations related to the implementation of unilateral coercive measures. However, the Special Rapporteur has pointed to the limits of the system set by the Optional Protocols to the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, related mainly to the fact that adherence to the Optional Protocols remains voluntary and that the decisions of the committees are not legally binding on States (ibid.). That remains true even if, as has been noted, "once a state is subject to the system, a degree of accountability is generated by publicly measuring the state party's conduct against the international

[25] For precise information on the judicial review of sanctions by the courts of the European Union, see A/HRC/33/48. In the case of *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, the European Court of Justice affirmed that it must "ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law", Judgment of the Court (Grand Chamber) of 3 September 2008.

[26] See Joël Rideau, "Recours en annulation — conditions de recevabilité", Jurisclasseur Europe Traité (LexisNexis, 2011). At least one case (unrelated to sanctions) has actually been brought by a non-European Union member State, Switzerland, against the European Commission before the European Court of Justice. See case C-547/10P, Judgment of 7 March 2013.

standard and by the attendant pressure on it to comply".[3] The Special Rapporteur has also expressed concern as to the apparent shortcomings of the protection afforded to victims of unilateral coercive measures by the European Court of Human Rights, since it remains unclear whether the Court may be found to have jurisdiction to address claims of violations of the European Convention on Human Rights in relation to the adverse impacts of measures taken by member States of the Council of Europe regarding the human rights of persons or groups living in third countries, as is precisely the case in most sanctions regimes (see A/HRC/33/48).

C. Remedies in international humanitarian law

28. In his first report to the Human Rights Council, the Special Rapporteur referred to several rules of international humanitarian law which may be of relevance in cases of unilateral coercive measures affecting basic human rights or the civilian population at large, for example the ban on collective reprisals (see A/HRC/30/45). It has already been observed by the Office of the United Nations High Commissioner for Human Rights that humanitarian law provisions, such as the prohibition against the starvation of a civilian population as a method of warfare and the obligation to permit the free passage of all consignments of essential foodstuffs and medical supplies, are crucial for the evaluation of economic coercive measures (see A/HRC/19/33). It may be recalled in that respect that a number of scholars have suggested that international humanitarian law (also referred to as the law of armed conflict), or at least principles derived from that body of law, should apply to the imposition of economic sanctions, by States acting both unilaterally and under the authorization of the Security Council, even during peacetime.[27]

29. To the extent that the rules of international humanitarian law may come into play with respect to unilateral coercive measures, it may be thought that remedies generally (or potentially) available to victims of violations of the law of armed conflict may also be relevant to the situation of persons subject to sanctions. That is, however, hypothetical and the Special Rapporteur is not aware of any instance in which remedies for unilateral coercive measures would actually have been sought on the grounds of violations of the law of armed conflict.

30. The right to a remedy for victims of violations of international humanitarian law has been recognized, inter alia, by the Commission on Human Rights and the General Assembly in the Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Violations of International Human Rights and Humanitarian Law. The Principles have been echoed in a number of international initiatives, including within the International Law Association.[28]

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[27] See W. Michael Reisman and Douglas L. Stevick, "The applicability of international law standards to United Nations economic sanctions programmes", *European Journal of International Law*, vol. 9, No. 1 (1998). For a discussion of that position, see, for example, Daniel H. Joyner, "International legal limits on the ability of States to lawfully impose international economic/financial sanctions" in *Economic Sanctions under International Law*, Ali Z. Marossi et Marisa R. Bassett, eds. (The Hague, T. M. C. Asser Press/Springer, 2015).

[28] See Liesbeth Zegveld, "Remedies for victims of violations of international humanitarian law" in *International Review of the Red Cross*, vol. 85, No. 851. See also the Declaration of International Law Principles for Victims of Armed Conflict, adopted by the International Law Association at its seventy-fourth conference in August 2010.

31. As regards procedural mechanisms through which victims of violations of the law of armed conflict may obtain compensation and redress, it may be distinguished between those available at the domestic level and those (potentially) existing at the international level.

32. At the domestic level, the point of departure is that international humanitarian law does not contain an obligation on States to give direct effect in their national legal systems to its provisions, so that the latter cannot in most cases be invoked by individuals before national courts in the same way as domestic rules. Some States give direct effect to provisions of the law of armed conflict, while other States choose to transpose the substance of such law into their domestic law. But, as has been observed "where neither course is adopted, victims are left empty-handed. This seems to be the more common situation worldwide".[29]

33. At the international level, the access of individuals to remedies and redress for violations of international humanitarian law generally requires the consent of the interested State(s) which, as experience shows, is/are generally reluctant to give such consent. Various mechanisms or forums may be considered relevant depending on the particular circumstances, the main forums being international claims commissions, international criminal tribunals (such as the International Criminal Court) and human rights bodies. The role of the International Committee of the Red Cross also needs to be mentioned in that context.

34. The Special Rapporteur wishes to stress that where unilateral coercive measures (of a non-military character) are applied in situations of armed conflict, the provisions of international humanitarian law shall be fully applied to those unilateral coercive measures.

35. In that respect, it needs to be observed that unilateral coercive measures have been applied in several recent armed conflicts, raising concerns in terms of their compliance with international humanitarian law. Those cases include the following:

(a) The blockade imposed on the Gaza Strip by Israel since 2007, which "severely restricts imports and exports abroad and transfers of goods between the West Bank and Gaza and was also explicitly intended to 'reduce the supply of fuel and electricity'", has been found by the Special Rapporteur of the Human Rights Council on the situation of human rights in the Palestinian territories occupied since 1967 to constitute "collective punishment of the people of Gaza, contrary to article 33 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)" (A/70/392).[30] It has been reported recently that the people of Gaza are "kept in a state of de-development by the long-standing blockade", which also has adverse effects on a range of human rights, especially the right to freedom of movement and the right to an adequate standard of living, related notably to a dire lack of potable water and a severely limited electricity supply (see A/HRC/31/73);

(b) The naval blockade imposed on Yemen by the coalition led by the Gulf Cooperation Council since the outset of its military intervention in March 2015, has been reported by the United Nations High Commissioner for Human Rights as

[29] Liesbeth Zegveld, "Remedies for victims of violations of international humanitarian law".

[30] The Secretary-General and the High Commissioner for Human Rights have consistently noted that the Israeli blockade of Gaza contravenes international law. See, for example, A/69/347, A/HRC/25/40 and Corr.1 and A/HRC/28/78.

having made dramatically worse an already dire humanitarian situation (see A/HRC/30/31);[31]

(c) The economic sanctions imposed since 2011 on the Syrian Arab Republic are among the main factors that "have seriously impaired the ability of Syrian civilians to earn a living", in addition of course to the ongoing hostilities (see A/HRC/31/68).

IV. Conclusions and recommendations

36. **The Special Rapporteur reiterates his finding, set forth as one outcome of the preliminary research he conducted for the most recent report he submitted to the Human Rights Council, that the review of existing mechanisms that have actually been used (or could arguably be used) to claim for damages for the adverse effects of sanctions points to the fact that such mechanisms are generally few and that their powers to grant effective remedies and damages, including compensation and redress, are most often limited (see A/HRC/33/48).**

37. **Against that background and in light of the findings of the present report, the Special Rapporteur wishes to emphasize again that in each situation around the world where unilateral coercive measures are found to have a negative impact on human rights, the right to a remedy should be effectively available and protected, and appropriate mechanisms at the national or international level should be available for the victims to obtain remedies, compensation and redress. It is definitely not acceptable that the populations of a large number of States are effectively deprived of access to any forum or mechanism before which they could seek remedies, compensation and redress. Such deprivation contravenes some of the basic obligations enshrined in most human rights treaties. The Human Rights Council and the General Assembly should be called to restate in a solemn manner, through a declaration, the right of victims to an effective remedy, including appropriate and effective financial compensation, in all situations where their human rights are adversely impacted by unilateral coercive measures.**

38. **The Special Rapporteur also calls for the international community to take decisive, practical steps aimed at enhancing the existing mechanisms, which allow victims of human rights violations related to unilateral coercive measures to claim for damages and obtain redress. In particular, the committees established under the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights to hear individual complaints should be reinforced and their competence to address human rights violations through unilateral coercive measures reaffirmed, irrespective of the location of the victim or of the perpetrator.**

39. **The Special Rapporteur has already drawn the attention of the Human Rights Council and the General Assembly to the fact that the first obstacle to a global evaluation of unilateral coercive measures is the unavailability of global**

[31] The report states that "Severe import restrictions, caused mainly by the naval blockade imposed by the coalition forces during the conflict, have also aggravated the humanitarian situation, resulting in fuel scarcity, which adversely affects the distribution of food and water, as well as the functionality of hospitals".

and standardized updated data pertaining thereto (see A/70/345). Measures aimed at ensuring transparency regarding sanctions regimes in force are a prerequisite for the implementation of the right to a remedy for the adverse consequences of unilateral coercive measures on human rights. The Special Rapporteur therefore reiterates that a consolidated central register should be set up, either at the level of the Security Council or the Secretariat, to recapitulate the list of all unilateral coercive measures in force. That register, which would be updated regularly, would be kept according to the standards currently applied for Security Council sanctions and would be made public. Sender/source States or groups of States would be invited to notify the Council of unilateral coercive measures in force on their initiative and of their evolution. The precedent of the United Nations Register of Conventional Arms appears particularly relevant in that context. The register was set up by the General Assembly in resolution 46/36 L, inter alia on account of concerns related to the fact that "arms transfers in all their aspects deserve serious consideration by the international community, inter alia, because of: (a) their potential effects in further destabilizing areas where tension and regional conflict threaten international peace and security and national security; (b) their potentially negative effects on the progress of the peaceful social and economic development of all peoples ...". To the extent that unilateral coercive measures raise similar concerns as regards their adverse impacts on affected countries and the enjoyment of human rights of their populations or segments thereof, it is submitted that the establishment of a similar register of unilateral coercive measures under United Nations supervision would be a major step towards transparency and would arguably contribute to accountability for the adverse effects of unilateral coercive measures.[32]

40. **Other possible steps to be taken, as suggested by the Special Rapporteur in his most recent report to the Human Rights Council (A/HRC/33/48), include:**

(a) **Establishing a mechanism enabling persons affected by unilateral coercive measures to seek remedies, compensation and redress at the level of the United Nations, which could take the form of a compensation commission set up either by the Security Council or by means of a multilateral convention. That would provide a forum through which individuals and entities affected by unilateral coercive measures could bring direct claims against the targeting State(s) or international organization(s). Such a commission could be called to review and adjudicate claims based on human rights violations arising from the imposition of sanctions, or rely upon the findings of the Human Rights Committee and the Committee on Economic, Social and Cultural Rights;**[33]

[32] On a technical level, the Register of Conventional Arms functions as a universal and non-discriminatory register maintained by the Secretary-General at United Nations Headquarters in New York. It includes data on international arms transfers and information provided by Member States on military holdings, procurement through national production and relevant policies. Member States are required to provide the Secretary-General with annual reports on imports and exports of arms. The Secretary-General is required to record that material and to make it available for consultation by Member States at their request.

[33] On the precedent of the Compensation Commission, see, for example, D. Shelton, *Remedies in International Human Rights Law*; Timothy J. Feighery, Christopher S. Gibson and Trevor M. Rajah, eds., *War Reparations and the UN Compensation Commission: Designing Compensation after Conflict* (Oxford, Oxford University Press, 2015); and Veijo Heiskanen, "The United Nations Compensation Commission" *Recueil des Cours: Collected Courses of the Hague Academy of International Law* (2002).

(b) **Borrowing the format of the dispute settlement system of the World Trade Organization to set up an adjudicatory body for addressing requests for compensation and reparation related to violations of human rights resulting from the implementation of unilateral coercive measures;**

(c) **Including in the universal periodic review of each source State an item on the unilateral coercive measures they apply to targeted countries, with an assessment of their human rights impact.**

United Nations A/71/288

General Assembly

Distr.: General
4 August 2016

Original: English

Seventy-first session
Item 67 (b) of the provisional agenda*
Elimination of racism, racial discrimination, xenophobia and related intolerance: comprehensive implementation of and follow-up to the Durban Declaration and Programme of Action

Group of independent eminent experts on the implementation of the Durban Declaration and Programme of Action

Note by the Secretariat

1. In paragraphs 12 and 13 of its resolution 70/140, the General Assembly reiterated its requests to the Secretary-General, pursuant to its resolution 68/151, to revitalize and reactivate the operational activities of the group of independent eminent experts on the implementation of the Durban Declaration and Programme of Action, and reiterated its invitation to the Human Rights Council, pursuant to paragraph 16 of Assembly resolution 68/151, to ensure the visibility, effective participation and optimal utilization of the vast knowledge and experience of the group within its subsidiary structures, charged with the mandate of and responsibility for the comprehensive follow-up to the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance and the effective implementation of the Durban Declaration and Programme of Action, and in that regard requested the Council to submit a progress report to the Assembly at its seventy-first session.

2. In this context, the Secretariat hereby draws the attention of the General Assembly to its note to the Human Rights Council on the latest developments with regard to the group (A/HRC/29/54).

3. The fourth meeting of the group was held on 28 April 2015 in Geneva, with the participation of Hanna Suchocka and Edna Maria Santos Roland, with Prince El Hassan bin Talal having resigned from the group and Salim Ahmed Salim having alluded, at the third meeting of the group, to his withdrawal from the group to allow for the appointment of another person able to devote the time required for the work. During the meeting, the experts discussed the possibility of and need for a number of arrangements in the future regarding the definition of the group's mandate, the

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appointment of new members and additional resources. The experts conveyed their views and concerns to the Secretary-General in a letter dated 11 August 2015.

4. The General Assembly is requested to take note of the current situation in the group and to take appropriate action.